NATURAL LAW & LAWLESSNESS: MODERN LESSONS FROM PIRATES, LEPERS, ESKIMOS, AND SURVIVORS

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Abstract

The natural experiments of history present an opportunity to test Hobbes' view of government and law as the wellspring of social order. Groups have found themselves in a wide variety of situations in which no governmental law existed, from shipwrecks to gold mining camps to failed states. Yet the wide variety of situations show common patterns among the groups in their responses to their often difficult circumstances. Rather than survival of the fittest, a more common reaction is social cooperation and a commitment to fairness and justice, although both can be subverted in certain predictable ways. The absent-law situations also illustrate the dependence of social order and cooperation on a group's commitment to justice.

The insights from the absent-law situations have implication for several modern criminal justice issues, including the appropriate distributive principle for criminal liability and punishment, restorative justice programs, the movement to promote non-incarcerative sanctions, transitional justice and truth commissions, the use-of-force rules under international law, the procedures for fairness in criminal adjudication, and crime-control policies in fighting organized crime and terrorism.

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In *Leviathan*, Thomas Hobbes puts government and the legal system as the wellspring of social order. Without them, in the "state of nature," "every man is enemy to every man,"[1] and under the "laws of nature," there is no right or wrong, only power and weakness. In *Order Without Law*, Robert Ellickson challenges Hobbes' view.[2] His study of ranchers and farmers in Shasta County shows that groups commonly organize their lives with social rather than legal rules, even for those regular points of tension among people that the law purports to control. He describes substitute social rules for dealing with situations as diverse as damage to adjoining property when livestock stray, deciding who should bear the cost of fences to prevent straying, and collisions with cattle that stray onto roads.[3]

On the other hand, one might argue that such instances of social cooperation in place of legal rules is not truly an undermining of the Hobbesian view of governmental law as the wellspring of order. The social accommodations that Ellickson cites may be possible only because the legal system created a situation in which such social accommodations are feasible. While the Shasta County ranchers and farmers may regularly use their own social arrangements in place of the legal system for some things, they still call the police when needed to insure the social order that makes such arrangements possible. Even just knowing they can call the police creates an atmosphere that would not exist without the legal system, or at least the criminal justice system. Perhaps the children at recess who play fabulously well together, as long as the playground monitor is standing by, might revert to "Lord of the Flies" without him.

A better test of the contribution of governmental law would be to drop the Shasta County rangers and farmers on a large farmable island by themselves. Without a criminal justice system of police, courts, and prisons, would they show the same degree of social cooperation? Or, without external restraint, would the strong bully the weak? This may be the better test of the Hobbesian view.

The difficulty, of course, is that there are not many volunteers for such an experiment. (I'm setting aside here the raft of reality television schemes that might seem to fit the bill. Besides the obvious sampling dangers – who volunteers for such wacky public exposure? – there still exists in such schemes the playground monitor in the person of the producers, standing by to assure that things don't spin too far out of control.) But Ellickson and others have shown that life can be rich with a variety of natural experiments, many of which can produce significant insights into modern problems.

This essay explores a collection of situations of lawlessness, in which people have been thrust into a world without governmental law or, in some instances, a world with formal law on the books that might as well not exist because it has no possibility of enforcement. The term "lawlessness" has two quite different meanings. It is used to refer to rampant misbehavior and also, less commonly, to refer to situations in which there exists no governing legal system. Does lawlessness in the latter sense produce lawlessness in the former sense? Without the playground monitor, will each person advance his or her own immediate interests at the expense of others or

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[1] Thomas Hobbes, Leviathan or The Matter, Forms and Power of a Common Wealth Ecclesiasticall and Civil, ch XIII (London, 1651).

[2] Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 10 (1991) ("Hobbes is off the mark").

[3] Id. at 9.

will people organize themselves in ways that will benefit the group as a whole? Without formal law, will the strong bully the weak to their own advantage, as Hobbes seems to assume?

A review of how groups react to absent-law situations suggests that the short answer is not likely to surprise Ellickson: It commonly occurs that social forces within the group, and internalized by its members, effectively control individual behavior to promote social cooperation, even if it is not obvious to the individual actor at the moment that such cooperation has a payoff for him. This should not surprise anyone, really. We are the living proof of such a human instinct toward a dynamic of social cooperation within groups. If it did not exist, we would have disappeared as a species from the law-less Serengeti Plain. Instead we flourished. What the absent-law cases reveal is a "natural law" of sorts – the rules that human groups construct for themselves to establish norms that will govern conduct among them, including the group's response to violations of those rules of conduct – that gives a more optimistic view of human nature than Hobbes', and that has important implications for modern criminal justice.

I. SITUATIONS IN WHICH LAW OR ITS ENFORCEMENT ARE ABSENT

There exist a wide array of situations in which no legal system exists to control wrongdoing within a group, as seen in the cases described in Sections A through C below. They involve small and large groups, as well as entire populations, but, as will become apparent, they share many dynamics.[4]

A. Natural Experiments with Small Groups: Airplane and Ship Wrecks

Natural experiments in absent-law situations can be found in more modern times, and in a wide range of situations. Consider several situations of small groups left on their own in isolation. In 1972, a plane carrying rugby players and their families and fans crashed in the Andes mountains. Because the plane was off course, the air searchers never found it and the passengers were left to survive on their own for months.[5] The difficult circumstances – freezing weather and limited food – certainly created incentives for the strong to increase their chances of survival at the expense of the weak. In 1824, Samuel Comstock, a crew member on the whale ship the *Globe*, orchestrated a mutiny during which all the senior officers were killed. The mostly teenage crew then swore allegiance to Comstock, as the head mutineer, and followed his directions in sailing the ship to a tropical island where they would live.[6] Without a legal system,

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[4] Not every instance of an apparent absent-law situation will in fact be uninfluenced by law. That is, one can imagine a group going on a trip and knowing that there will be no immediate presence of law enforcement during the trip, yet nonetheless act as if there were because any violation during the time will be punished upon their return. Thus, to get a true absent-law effect, the group must be in a situation in which they are unsure that they will return to a situation of law enforcement or, if they know that law will return, they believe that violations in the interim cannot or will not be punished upon its return. This is the case with all of the situations noted in this Part.

[5] Piers Paul Read, Alive: The Stories of the Andes Survivors 221 (1974); Nando Parrado, Miracle in the Andes: 72 Days on the Mountain and My Long Trek Home (2006).

[6] William Comstock, The Life of Samuel Comstock the Terrible Whaleman 88 (1840); Thomas Heffernan, Mutiny On The Globe (2002).

do the groups develop a social accommodation with an enforcement mechanism that controls wrongdoing of one member against another?

In 1864, the sailing ship *Grafton* ran aground and wrecked in an interior bay of an island in the Aucklands. Several months later, the *Invercauld* wrecked on the exterior coast of the same island. The two parties never knew of one another. When the *Grafton* party finally managed to rescue themselves 20 months after wrecking, all 5 of the men had survived. When the *Invercauld* party was rescued after only 12 months on the island, only 3 of the 25 were still alive.[7] Why such different results in such similar physical conditions?

In 1628, the Dutch East Indian company ship *Batavia* wrecked on a remote island group 2,000 miles from Java. The 280 survivors split into different groups, which ended up being run quite differently. When rescuers finally arrived, an aggressor group, which was responsible for more than one hundred deaths, was using the ship's canon to attack a second group, which had provided safety and support to anyone who joined them.[8] Why the different approaches of the two groups?

B. Natural Experiments with Large Groups: Colonies, Camps, Wagon Trains, and Institutions

Absence-law situations can occur in much larger groups as well. Some are created voluntarily. In 1848, gold was discovered on the property of a saw mill in Northern California. In the next seven years, more than 300,000 people rushed to California from all over the world to mine for gold. San Francisco, the port of entry for most miners, exploded from a sleepy 200 to 40,000 in just a few years. California was not yet a state, nor even a territory. While the U.S. had no legal authority in the region, it eventually appointed a Governor nonetheless, who claimed to govern what was said to be an independent region that an earlier group of residents had claimed to have seceded from the chaotic Mexican government. But whoever may have claimed legal authority to govern, there is no effective mechanism of law enforcement. Yet each mining camp had a strong incentive to organize itself in some way so as to prohibit and punish aggressive conduct, for chaos interfered with gold mining.[9]

Other examples of voluntarily created colonies include the 1840s wagon trains from Missouri to Oregon.[10] They were essentially temporary moving colonies, with a shared goal. The first successful European colony in America, at Jamestown in 1607, similarly was cut off

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[7] Joan Druett, Island of the Lost: Shipwrecked at the Edge of the World (2007); Francois Edouard Raynal, Wrecked on a Reef or Twenty Months Among the Auckland Isles (1874); Madelene Allen, Wake of the Invercauld: Shipwrecked in the Sub-Antarctic: A Great-granddaughter's Pilgrimage (1997).

[8] Mike Dash, Batavia's Graveyard: The True Story of the Mad Heretic Who Led History's Bloddiest Mutiny (2002); Henrietta Drake-Brockman, Voyage to Disaster (2006).

[9] Charles Howard Shinn, Mining Camps: A Study in American Frontier Government (1965); Mary Floyd Williams, History of the San Francisco Committee of the Vigilance of 1851 (1921).

[10] Thomas A. Rumer, The Wagon Trains of '44: A Comparative View of Individual Caravans in the Emigration of 1844 to Oregon (1990).

from traditional law enforcement and had to establish for themselves some means by which to control their members' dealings with one another.[11]

In some instances, the group creation and the need to organize it was not sought, or even planned, but rather thrust upon the group by the circumstances in which they found themselves. In 1972, prisoners rioted, eventually taking over Attica prison for many days. Once they had control of the prison, they could rampage or they could organize themselves in some way. Certainly this particular population had already shown themselves to be willing to ignore law even when it existed.[12] In the 1700s, pirates formed into base camps, but of course were unable to call on legal authorities to maintain order within a colony.[13] In the 1600's, escaped slaves in the Carribean formed themselves into groups in Jamaica, Cuba, and other locations, and became known as the Maroons. They obviously could not rely on existing legal authorities, with whom they were typically in conflict. If they were to organize themselves, they would have to do it on their own.[14] In 1967, the British withdrew from governing the Island of Anguilla. Its residents refused to be part of the British plan for a new country made up of many islands in the area, but instead overnight went off on their own.[15] In 1767, the mutineers from the H.M.S. Bounty fled to Pitcairn Island, essentially taking over the island and setting up their own society. Again, many of the group's members had already shown their willingness to be law-breakers.[16]

Some groups ended up in new colonies only because they were brutally forced into it. In 1865, Hawaii dealt with its fear of a spread of leprosy by rounding up all lepers, and often their families, and depositing them on Molokai Island from which they could not escape. The authorities provided few resources and little governance, hoping the island community would simply become self-sufficient. The new colony had no effective law enforcement system.[17]

C. Natural Experiments with Large Populations: Eskimos, Occupied Areas, Riots, Hurricanes, and Failed States

The absent-law problem also can arise in a larger population, even in a group that has been long-standing. The Netsilik people of far Northern Canada, until the arrival and settlement of Europeans at the beginning of the 1900's, faced essentially the same weather and resource

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[11] David A. Price, Love and Hate in Jamestown: John Smith, Pocahontas, and the Start of a New Nation (2005); James P. Horn, A Land as God Made it: Jamestown and the Birth of America.(2006).

[12] Tom Wicker, A Time to Die: The Attica Prison Revolt; Bert Useem & Peter Kimball, States of Siege: U.S. Prison Riots 1971-1986 (1975).

[13] Colin Woodard, The Republic of Pirates: Being the True and Surprising Story of the Carribean Pirates and the Man Who Brought Them Down (2008); Woodes Rogers, A Cruising Voyage Round the World: The Adventures of an English Privateer (London 1711).

[14] Richard Price, Maroon Societies: Rebel Slave Communities in the Americas (1996); Mavis Christine Campbell, The Maroons of Jamaica, 1655-1769 (1988).

[15] Brian Dyde, Out of the Crowded Vaugness: A History of the Islands of St. Kitts, Nevis, and Anguilla (2006); Colville Petty, Anguilla's Battle for Freedom, 1967 (1987).

[16] Karen Marks, Lost Paradise: From Mutiny of the Bounty to a Modern-Day Legacy of Sexual Mayhem, the Dark Secrets of Pitcairn Island Revealed (2009); Robert W. Kirk, Pitcairn Island: The Bounty Mutineers and Their Descendants (2008).

[17] John Tayman, The Colony: The Harrowing True Story of the Exiles of Molokai (2007); Hilde Eynikel, Molokai: Te Story of Father Damien (1998).

challenges as the air-crash survivors in the Andes, but had been doing so for generations. They did not have the luxury of establishing a governmental legal system; the harsh conditions essentially required that every family spend all its resources trying to survive.[18]

Even if a functioning legal system exists, it may be unavailable to some groups within the society. In 1945 Berlin, the Soviet Army was an occupying force that had little interest in the local population other than to abuse them. If there were to be unwritten rules governing the dealing of one resident with another, it would have to be the residents who would develop and enforce them without governmental help.[19] An analogous situation existed within the Nazi concentration camps,[20] and within the Japanese camps for prisoners of war.[21] The prisoners had to sort out for themselves how to regulate behavior among themselves.

Some situations arose in which an existing criminal justice system became temporarily unavailable, as during the 5 days of rioting in Detroit in July 1967,[22] or after Hurricane Katrina in New Orleans, which caused levee failures and created an absent-law city for more than a week.[23] On a larger scale, no effective criminal justice system exists in failed states, such as Somalia beginning in 1991,[24] and in parts of Pakistan since the 1990's and before.[25] Absent-enforcement also can be seen during American Prohibition of the 1920's and early 1930's.[26]

An absent-law situation also can occur when the government itself becomes seriously corrupted. From 1980 until 1993, Pablo Escobar exercised increasing power in Colombia. Through bribery and intimidation, he subverted much of the executive branch and the judiciary. Eventually, he even took effective control of the legislative branch, dictating what legislation they would and would not pass.[27]

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[18] Knud Rasmussen, The Netsilik Eskimos: Social and Spiritual Culture (1931); Gontran De Poncins, Kabloona (1941).

[19] Anonymous, A Woman in Berlin: Eight Weeks in an Conquered City – A Diary (2005); Anthony Beevor, The Fall of Berlin 1945 (2003).

[20] Israel Cymlich & Oskar Strawczynski, Escaping Hell in Treblinka (2007); Israel Gutman, Resistance: The Warsaw Uprising (1994).

[21] Robert Levering, Horror Trek: A True Story of Bataan, The Death March and Three and One-Half Years in Japanese Prison Camps (1948); Roy Whitecross, Slaves of the Son of Heaven: A Personal Account of an Australian POW, 1942-1945 (1951).

[22] Sidney Fine, Violence in the Model City: The Cavanagh Administration, Race Relations, and the Detroit Riot of 1967 (2007); Van Gordon Sauter & Burleigh Hines, Nightmare in Detroit: A Rebellion and Its Victims (1968).

[23] Douglas Brinkley, The Great Deluge: Hurricane Katrina, New Orleans, and the Mississippi Gulf Coast (2007); Sherri Fink, The Deadly Choices at Memorial, New York Times Magazine, August 30, 2009, at 28.

[24] I. M. Lewis, A Modern History of the Somali: Revised, Updated, and Expanded (2003); Peter D. Little, Somalia: Economy Without State (2003).

[25] Malik Khuda Baksh Awan, Anti-Corruption Strategies in Pakistan (2004); Carl B. Klockars, Sanja Kutnjak Ivkovic, M.R. Haberfeld, The Contours of Police Integrity (2004).

[26] Michael Woodwiss, Crime, Crusades, and Corruption: Prohibition in the United States, 1900-1987 (1988); Edward Behr, Prohibition: Thirteen Years that Changed America (1996).

[27] James Mollison, The Memory of Pablo Escobar (2007); Mark Bowden, Killing Pablo: The Hunt for the World's Greatest Outlaw (2002).

D. The First Natural Experiment of Humans in an Absent-Law Situation: The Serengeti Plain

A study of these absent-law situations can tell us something about what humans do when left to their own devices with no existing criminal law system. What are the dynamics at work in such absent-law situations? The case studies might make one more sympathetic in some ways to the Hobbesian view of the inherent badness of man and the essential role of government and law, or they might suggest a tendency toward cooperative action without governmental law, as Ellickson seems to suggest. Part II considers what lessons we can learn, but before examining these situations, consider the very first absent-law situation of pre-history: that of early human groups on the Serengeti Plain.[28] They had nothing but themselves, not even a history of creating group norms, let alone social institutions. How did they get along with one another? Was is survival of the fittest, or some form of social cooperation?

Clearly early human groups faced serious hurdles to social cooperation. At minimum, social cohesion requires some check on such basic conduct as physical aggression and taking of possessions without consent. A member who is regularly victimized is hardly likely to be an enthusiastic contributor to the group's goals, which typically required not just cohesion but cooperation, be it hunting or agricultural. Some basic protections must be assured if a high level of cooperation is to be achieved to give the comparatively small and weak humans an edge against predators and hardship. Further, some shared understanding among the members must exist as to the basic rules of conduct that must be adhered to at minimum. A group might come to agreement on minimum rules of conduct yet the real challenge comes when the group must deal with a violation of those rules – it seems inevitable that at some point there will be physical conflict or unconsented-to takings. If social pressures are insufficient to gain compliance with the group's rules, the most readily available means of punishing physical violence or an unconsented-to taking is, well, physical violence or an unconsented-to taking.[29]

Thus, an effective enforcement practice requires also a shared understanding of the difference between violence or taking as a violation versus violence or taking as justly deserved punishment. That is, the group must have some shared understanding of not only the prohibitions but also of the circumstances under which the prohibitions can be set aside to punish violations. Even that is not enough. Cooperation is not likely to be maintained if trivial violations are punished brutally. There must be some shared understanding of how serious a violation is and when punishment reaches the point of being more than deserved, thereby crossing the line into prohibited violence.[30]

Although it is pre-history, we can guess that early human groups did develop shared understandings of wrongs and their just punishment, because the groups survived, indeed flourished. Indeed, many argue that it was just this capacity for social cooperation that led to the

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[28] Ann Gibbons, The First Human: The Race to Discover Our Earliest Ancestors 89 (2007); see also Leonard Jeffries, Africa: Birthplace of Humanity, http://www.africawithin.com/jeffries/africa_birthplace.htm (Last visited Nov. 29, 2011).

[29] Killing or expelling the violator is possible, but given that it would weaken the group's overall strength, it may well be seen as a sanction of last resort.

[30] Paul H. Robinson, Robert Kurzban & Owen D. Jones, The Origins of Shared Intuitions of Justice, 60 Vand. L. Rev. 1633, 1636 (2007).

success of humans.[31] Some would see this tendency toward cooperation as part of what it means to be human, as defining us as a species.[32]

II. LESSONS FROM ABSENT-LAW SITUATIONS

The absent-law situations in Part I present a wide range of groups in a wide range of contexts who had to sort out for themselves what to do without governmental law or at least without the possibility of its enforcement. Do the members nonetheless arrange some kind of social order? Social order, rather than the destructive chaos of Hobbes' "state of nature," seems possible only through social cooperation. Yet how likely is social cooperation in these circumstances, especially given that in many of them a person's very survival is at stake. While humans may find it useful, even pleasant, to cooperate when times are good, won't impossible circumstances bring out the worst in people? Won't the instinct for survival trump social norms, like the respectable gentleman who instinctively pushes the elderly lady off the ship's ladder as he tries to save himself from drowning?

While people sometimes do revert to survival of the fittest, the cases noted in Part I show a surprising tendency of groups toward social cooperation even in the most difficult of circumstances and even when it is not apparent to the individual member that his or her own best interest lies in social cooperation. Section A below illustrates this dynamic. This odd but resilient tendency toward cooperation – the "cooperation principle," as it is it might be termed – can be subverted by any number of forces, as Section B shows, yet the apparent persistence of cooperation despite these subversions might lead one to believe that it represents some kind of instinctive human default. The diversions from social cooperation seem explainable, even predictable; more puzzling is the appearance of social cooperation out of nothing and sometimes against the immediate self-interest of the individual as perceived at the time.

The absent-law case studies speak to criminal justice issues in particular. The obvious greatest challenge to social cooperation is wrongdoing by members against other members,

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[31] Ernst Fehr & Herbert Gintis, Human Motivation and Social Cooperation: Experimental and Analytical Foundations, 33 Annu. Rev. Sociol 43, 46 (2007). [hereinafter *Fehr & Gintis, Human Motivation*] (establishment of modern order-producing institution such as the state and codified law are result of foregoing social cooperation); Henrike Moll & Michael Tomasello, Cooperation and Human Cognition: The Vygotskian Intelligence Hypothesis, 362 Phil Trans. R. Soc. B. 639 (2007) (cognitive skills that enabled humans to create complex technologies, cultural institutions, and systems of symbols are driven by, or even constituted by, their capacity for social cooperation).

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> Hobbes concluded that social order is the product of powerful social institutions, including property rights, codified law, and a strong state. Hobbes's approach has been strongly espoused in modern times by neoclassical economic theory, which has applied general equilibrium and repeated game theory to show that these institutions permit large-scale cooperation among unrelated self interested individuals. However, in an evolutionary time frame, these order-producing institutions came into place only very recently. Humans had to solve the problem of social order long before they invented and implemented these institutions. In fact, the very existence of these order-producing institutions is itself a result of foregoing social cooperation. We therefore must search for more basic mechanisms that could already generate social order in much simpler societies.

Id.

wrongdoing that in a legal system would be seen as a crime – most importantly unjustified aggression, taking of property without consent, and deceit or fraud in exchanges. Similar to the persistent tendency toward social cooperation, the cases suggest a "justice principle," an inherent interest in doing justice, even when doing so has costs to the individual and the group. It is a commitment seen not only in victims but also in unrelated third parties who will gain no benefit from the punishment. This is the subject of Section C.1 below.

Just as social cooperation seems necessary for group survival and success, the case studies reviewed in Section C.3 suggest that doing justice is necessary in turn for stable social cooperation. Violation of key group norms must be punished in a way that the group sees as just – not too harsh, not too lenient – if the members of the group are to continue their commitment to cooperation. This seems logical enough. If a member is advancing group interests through cooperation with others, perhaps even at the expense of his or her own interests, it would be disheartening to see others violate the group's norms in order to advance personal interests, yet not be sanctioned. A failure to punish tends to undermine the group's claimed commitment to the norms. On the other hand, excessive punishment, beyond what is seen as deserved, becomes unjustified violence, and thus a violation of the group's basic norms. This is the subject of Section C.2. Like the cooperation principle, there are a variety of forces that can subvert the justice principle, as Section D illustrates.

The persistence of the desire for justice, in even difficult circumstances, makes it seem as if it is, like social cooperation, also a human default. It is perhaps no surprise that cooperation and justice are tied together in this way, for the latter may be a prerequisite for the former. Whatever forces made social cooperation the human default – genetic predisposition or some form of universal social learning – if doing justice is necessary for stable social cooperation, then it may be no surprise to see those same forces would press toward making doing justice a similar human default.

A. The Cooperation Principle

Perhaps the most obvious lesson from the absent-law cases is that government and law are not necessary for social cooperation and order. Forces of social influence can create group norms and dynamics that can be as or more effective than formal law in this respect.

1. Cooperation Bringing Order Without Law. Consider the experience of the wreck of the Grafton. Four men watch helplessly as their ship is pushed closer to the rocky coast of a remote island. A fifth member lies helplessly sick in bed below decks, as he has been for weeks. In any case, he (and others) does not know how to swim. During the night, the ship wrecks on the rocks some distance from shore. How do the members of the group react to the situation? It is clear to the healthy swimmers that their chances of survival are better if they abandon the sick man. In fact, they work together to get all men to shore safely, built a shelter, and care for the sick man (They eventually built a sea-worthy craft in which they can sail to safety.) The group had internal tensions, but they agreed upon a set of rules that all would be bound by, selected a leader, and worked together to save all. Is this a unique story of exceptional men acting

heroically toward one another? No, the pattern of social cooperation appears regularly in a wide variety of situations of a Hobbesian "state of nature."[33]

When their plane crashes in the Andes, do the young rugby teammates and their fans not break into Lord of the Flies? With such limited food and shelter, it must have been clear to the uninjured that they were better off trying to keep themselves alive. Yet, they do the opposite. They organize themselves to free those trapped in the wreckage, tend to the injured, build a shelter, and organize themselves into different jobs to advance the interests of all in the group. (After two and a half months, two members succeed in an astonishing trek out of the mountains to get help, and all who survived the crash are saved.)[34]

In the 1866 exile of lepers to Molokai Island, sixteen people are put ashore in the first wave. Each member of the group is given a blanket and a farm implement, and told to fend for themselves. There is little food, and firewood and water is miles away. Some are in quite advanced stages of the disease. It would make perfect sense for the strong to do what they needed to help themselves at the expense of the weak. But when a government official arrives weeks later he finds that some people had taken charge of nursing the bedridden, others are scavenging and preparing food, and others are hauling firewood and water.[35]

In the mining camps of California, the territory was not governed by any law and each camp was a transitory group. A camp would disappear overnight if the gold ran out. Yet in each camp, the miners formed a set of social norms, with an enforcement mechanism, so powerful that a miner could leave all his worldly goods unattended for the entire day while he mined.[36]

During the four days of riots in Detroit in 1967, neighborhood social groups that had previously put on teas and block parties, reorganized into armed neighborhood-watch groups to discourage looting. They also provided protection to firefighters, who had been under attack.[37] This is how one apartment building reacted to the chaos:

> The men in the building, would occasionally walk the halls to check on fellow neighbors. By evening, the crowds had come closer to their location. . . . The men held a small meeting and discussed going on their roof with blankets and water buckets, to protect their building from sparks flying through the sky. They took a vote and a majority agreed to go up.[38]

In the aftermath of Hurricane Katrina, the Convention Center was used as a shelter by thousands of people who were herded there by the authorities. Street gangs turned civic-minded and provided security when city authorities did not (albeit after agreeing on each gang's "turf"). As one eyewitness recalls:

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[33] See Hobbes, *supra* note [1].

[34] Read, supra note [5], at 299.

[35] Tayman, supra note [17], at 41.

[36] Shinn, supra note [9], at 119.

[37] Sauter, supra note [22], at 191.

[38] 1967 Detroit Riot Victims, RecoCities, http://www.reocities.com/michdetroit/riot1967.html (last visited 15 December, 2011).

> They were securing the area. . . . These guys were criminal. They were. But somehow they got together, figured out who had guns, and decided they were going to make sure that no women were getting raped . . . and that nobody was hurting babies [children]. . . . They were the ones getting clothes for people who had walked through that water. They were the ones fanning old people . . . .[39]

When the British decolonized the small island of Anguilla in 1967 over residents' objections and residents rejected consolidation with other islands in the area, they overnight were left to govern their island through non-governmental institutions, such as churches, elders, and teachers. Being seen as a good neighbor was important enough to people to provide the social order that the law did not.[40]

When the SS was hunting down all those left in the Warsaw Ghetto to send them to camps, those who remained took refuge in cellars, attics, and behind false walls:

> The bunker grew increasingly crowded and stuffy. Anyone who went to the water-tap or toilet collided with others or stumbled over their neighbors in the darkness. There was no end to the disputes and squabbles, fights over nothing, insults, name-calling. Exhausted by the want of fresh air and the most elementary facilities, tortured by incessant fear and uncertainty, people began losing their self-control. The bunker became a real hell. . . . Yet, in the midst of this suffering, there grew up a solidarity, a mutual understanding and sympathy. It was no longer necessary to shout for quiet, lest the SS track us down, nor ask too long for neighborly help. People helped one another, even shared the last drops of medicine, without caring whether someone was a relative of a stranger, a friend or unknown, poor or rich. The differences between us disappeared. In the end, our mutual and tragic fate had united us into one great family.[41]

2. Social Cooperation as Part of Human Nature. What explains the appearance of social cooperation even in these desperate circumstances? As outside observers with perfect hindsight, we often can see that cooperation may be better for the group as a whole and therefore for its members,[42] but how realistic is it that the individual persons in these difficult

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[39] Brinkley, supra note [23], at 475-76.

[40] Personal interview with Colville Petty by Sarah Robinson, Memo to file: Questions for Colville Petty, June 18, 2010. The same tendency toward cooperation is seen in previously lawless societies where an opportunity for order is quickly embraced. In the Gujranwala Range region of Pakistan, crime rates were high and the police corrupt and inept. People avoided interaction with the police at all costs. In 1991, a new police inspector introduced reforms, which brought police arrests of criminals and the return of stolen property, instead of the usual bribes and complicity. Although the people of the region had lived for generations under a corrupt police force, in took only a few months for them to begin helping police. With a level of trust and cooperation, crime rates fell rapidly. Azhar Hassan Nadeem, Pakistan: The Political Economy of Lawlessness 215 (2002).

[41] Halina Birenbaum, Hope is the Last to Die: A Coming of Age Under Nazi Terror 71-75 (1971).

[42] See generally Part II.B.1 below, documenting the importance of cooperation for group survival. See also Morris B. Hoffman, The Neuroeconomic Path of the Law, 359 Phil. Trans. R. Soc.

(continued...)

circumstances can see that wisdom and be willing to act on it, especially when doing so may carry immediate personal costs. Cooperation is at best a risk – an immediate sacrifice for a potential longer-term payoff. It is more likely that no such calculation is even made by the people in these desperate circumstances. Few are probably reasoning at all, but rather just responding instinctively to their immediate predicament, be it hiding in a Warsaw Ghetto bunker or recovering from the shock of their recent wreck or crash. Yet, despite the shock and fear, their instincts commonly lead them to cooperation.

The tendency toward social cooperation and order sometimes appears in extreme forms and in unusual situations. At the conclusion of World War II, the ordinary citizens of Berlin had been forbidden to leave the city in advance of the Russian Army. Trapped beneath the shelling were thousands of hungry and cold civilians who knew that their leaders had left the city or killed themselves. Yet, despite the desperate and chaotic circumstances, order was maintained. With Russian bombs falling around them, residents did not scramble for rations, but rather stood in orderly lines waiting their turn. When a Russian bomb hit one line, the line simply moved up to fill in the space left by those killed.[43] A woman who stood in the line talked about her life living in a basement:

> We're no longer being governed. And still, everywhere you look, in every basement, some kind of order always emerges. When my house was hit I saw how even those who'd been injured or traumatized or buried in the rubble, walked away in an orderly manner. The forces of order prevail in this basement as well, a spirit that regulates, organizes, commands. It has to be in our nature. People must have functioned that way as far back as the Stone Age. Herd instinct a mechanism for preservation of the species."[44]

During World War II, Japan transported prisoners from the camps in the Philippines to mainland Japan to use as slave labor. Men by the thousands were packed into the holds of cargo ships, with little food, water, medical care, or even toilet facilities. The transport ships have come to be referred to as the Hell Ships. Aboard the Oryokko Maru, one such ship, there were 1,619 men baking in the hold. Insufficient air was spreading panic and chaos. A commander climbed half way up the ladder and addressed the men. "If each man remains calm and still, it will be better for all. The more you move, the more energy you burn." He tells the men how to act for the common good and they do as he directs: "Now hear this. The men in the far corners are suffocating. Take off your shirts and fan the air towards them."[45]

On a different ship, the same pattern is repeated: first panic then order. "As a guy goes crazy he starts to scream – not like a woman, more like a dog. We're in solid, wall to wall. Tight, so you couldn't put your feet between people when you tried to walk. We were practically naked by that time, because we had taken off everything in order to cut down on the heat. It must

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[42] (...continued)
Lond. B 1667, 1670 (2004) (explaining long-term advantages of cooperation).

[43] Anonymous, supra note [19], at 34.

[44] Anonymous, supra note [19], at 13.

[45] Manny Lawton, Some Survived: An Eyewitness Account of the Bataan Death March and the Men Who Lived Through It 158 (1984).

have been 120 or 125 degrees in that hold. . . . People running and screaming."[46] The prisoners were warned that the screaming was bothering their captors and that if it continued the hatches would be closed. To prevent the closure of the hatch, screamers were killed. "If they howled, they died." The hatches were not closed. "Many that went mad with the heat were knocked out, too, and some of them killed by their neighbors. The screaming, knifing, blood sucking, with feces and urine everywhere, the sick being trampled beyond recognition."[47] But even here social cooperation eventually set in.

> The wooden hatch at the base of the ladder is filling up with men that a week ago looked as though they would stand the ordeal. Laff, a huge corpsman, is doing a fine job helping out at this temporarily set-up sick bay. There are many more doing a fine job with what they have to work with. Numerous men are dirtying their clothing but there isn't anything they can do about it.

After the first two days, no one is killed. Instead, new ways are found to deal with those who go crazy, including tying them up.

As Terrence Des Pres explains it in his classic book about the holocaust, *The Survivor*:

> Nature itself – by which I mean the system of living creatures – guards against dissolution and chaos; not through control by government, nor even by rational adherence to "laws of nature," but through the emergence, during times of prolonged crisis, of structures of behavior whose purpose is to maintain the social basis of life. Order emerges. That, as biologists like to observe, is the first and most striking fact about life, since entropy or the tendency to dissolution characterizes all inorganic kinds of organization. For survivors this is crucial. Uprooted and flung into chaos, they do what they must to stay alive, and in that doing achieve enough society to meet the crisis humanly, together. After the period of initial collapse comes reintegration, a process which usually occurs gradually, in accord with the fact that all things human take time. In some cases, however, it can happen remarkably fast.[48]

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[46] Donald Knox, Death March: The Survivors of Bataan 339 (1981).

[47] George Curtis, 47 Days on the Hell Ship (Version 1: December 15), available at http://www.lindavdahl.com/Bio%20Pages/George%20L%20Curtis%20Hellship%20Account.htm (last visited on December 5, 2011).

[48] Terrence Des Pres, The Survivor: An Anatomy of Life in the Death Camps 144 (1976). Des Pres quotes this account of an ordeal during mass deportation:

> "Ninety-six persons had been thrust into our car, including many children who were squeezed in among the luggage. . . . As the first hour and then the second passed, we perceived that the simplest details of existence would be extremely complicated. Sanitary disposal was out of the question. . . . As the journey stretched endlessly, the car jerking and jolting, all the forces of nature conspired against us ninety-six. A torrid sun heated the walls until the air became suffocating. . . . The travelers were mostly persons of culture and position from our community. . . . But as the hours slipped away the veneers cracked. Soon there were incidents and, later, serious quarrels. . . . The children cried; the sick groaned; the old people lamented. . . . As night fell we lost all concept of human behavior and the wrangling increased until the car was bedlam.

(continued...)

He describes the dynamics of 96 people jammed into a railway boxcar during the mass deportations, partially quoting one of the people present.

> The "veneer " of cultivated behavior, which served well enough in normal times, was not equal to such stress. Fear and panic were the initial response, and for a time all was chaos. But then, as necessity bore down and hysteria gave way to realism, a more elementary king of order, or at least a readiness, began to function. A condition came into being which allowed the "cooler heads" to be heard. Amid the mess they held an election, they came to agree on basic responsibilities, and settled down to face their common plight. This achievement may have been but a "semblance" of past order, but it was sufficient to keep the ninety-six people in that boxcar sane and alive and above the threshold of brutality.
>
> Civility disintegrates and disorder prevails. Then slowly, in sorrow and a realism never before faced up to, the mass of flailing people grow quiet and neighborly, and in the end rest almost peaceful in primitive communion. In this and other instances,
>
>> the simple, shapeless agglomeration of human beings assembled by chance reveals a hidden structure of available wills, an astonishing plasticity which takes shape according to certain lines of force, reveals plans and projects which are perhaps unfeasible but which lend a meaning, a coherence to even the most absurd, the most desperate of human act.
>
> Order emerges, people turn to one another in "neighborly help." This pattern was everywhere apparent in the world of the camps.[49]

These anecdotal observations are consistent with a large volume of empirical evidence that rejects the notion that humans are exclusively self-regarding and aspire only to maximize their own payoff.[50] Experimental studies show that most individuals are "strong reciprocators," who are predisposed to cooperate with others, as long as others cooperate. More on this later.[51] The human tendency toward cooperation is a complex and puzzling issue that evolutionary and

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[48] (...continued)

> . . . Finally, the cooler heads prevailed and a semblance of order was restored. A doctor and I were chosen captains-in-charge."

Id.

[49] Id. at 144-146 (citations omitted).

[50] Herbert Gintis et al, Explaining Altruistic Behavior in Humans, 24 Evol. Hum. Behav. 153 (2003) (presenting empirical experiments that reject notion that humans are purely selfish and motivated only by self-interest); Colin F. Camerer, Behavioral Game Theory – Experiments in Strategic Interaction (2003) (presenting behavioral game theory experiments that show results inconsistent with notion that humans are selfish beings); Fehr & Gintis, Human Motivation, supra note 5, at 45 (large body of experimental evidence exists that refutes assumption of mainstream economics that all or most people are exclusively self-regarding and are only motivated by desire to maximize their own payoff).

[51] See accompanying notes at [111-115] supra.

social scientists have sought to explain for the past 40 years.[52] Studies show that humans take cooperative actions that are costly to them, even when there is no prospect of them being directly or indirectly repaid for the costs they endure. For example, humans will invest in cooperative acts that benefit the group at their own expense, even when interacting with complete strangers and even when there is no possibility they will have an opportunity to interact with the same group again. That is, they cooperate even if they have no possibility of being repaid and have no expectation of gaining any indirect personal benefit such as improving their social status or reputation.[53]

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[52] Terence C. Burnham & Dominic D. P. Johnson, The Biological and Evolutionary Logic of Human Cooperation, 27 Analyse & Kritik 113, 116 (2005).

[53] Fehr & Gintis, Human Motivation, supra note [32], at 45-6; Samuel Bowles & Herbert Gintis, The Origins of Human Cooperation, *in* Genetic and Cultural Evolution of Cooperation 429 (Ed. Peter Hammerstein, 2003); Terence C. Burnham & Dominic D. P. Johnson, The Biological and Evolutionary Logic of Human Cooperation, 27 Analyse & Kritik 113, 116 (2005); Stuart A. West et al., Sixteen Common Misconceptions About the Evolution of Cooperation In Humans, 32 Evolution of Human Behavior 231 (2011); Herbert Gintis et al., Explaining Altruistic Behavior in Humans, 24 Evolution and Human Behavior 153, 154 (2003); Herbert Gintis, Strong Reciprocity and Human Sociality, 206 Journal of Theoretical Biology169 (2000b); Joseph Henrich et al., Cooperation, Reciprocity and Punishment in Fifteen Small-Scale Societies, 91 American Economic Review 73 (2001).

Although scholars generally agree that humans possess a predisposition to cooperate, there is currently no consensus as to the source of this form of behavior, and many theories are presented. See id. Burnham & Johnson; Stuart A. West et al., Sixteen Common Misconceptions About the Evolution of Cooperation In Humans, 32 Evolution of Human Behavior 231 (2011). One line of studies, comparing human behavior with that of apes, reveal that while primate's cognitive development is driven primarily by social competition, human's is driven by cooperative social interaction. Scholars conclude that regular participation in cooperative interactions during childhood leads humans to develop uniquely powerful traits and that these become entrenched because of their evolutionary advantage. Moll & Tomasello, supra note [32]; Lev S. Vygotsky, Mind In Society: The Development of Higher Psychological Processes (1978). Another theory asserts that groups consisting of cooperative individuals are more successful than groups that refrain from cooperation. Groups with cooperative attributes survived, while others did not. This theory is supported by empirical studies showing that humans are inclined to engage in costly cooperative acts that contribute to the success of the group, even if not to the individual directly. This is especially evident in situations of inter-group conflict. These results led some scholars to conclude that it was the process of "group selection" (an evolutionary process through which traits that contribute to the success of the group and promote the chances of the group to survive, prevail through evolution), rather than individual evolutionary advantage, that contributed to the development of cooperative behavior in humans. See Fehr & Fischbacher, supra note [51], at 790; Herbert Gintis et al., Explaining Altruistic Behavior in Humans, 24 Evolution and Human Behavior 153 (2003); Peter J. Richerson et al., Cultural Evolution of Human Cooperation, *in* Genetic and Cultural Evolution of Cooperation 357 (2003); Robert Boyd, The Evolution of Altruistic Punishment, 100 Proceedings of the National Academy of Sciences 3531 (2003).

B. Subverting Social Cooperation

While cooperation may have surprising persistence in even difficult circumstances, it is also true that a variety of forces can frustrate the creation of social cooperation. That can lead to tragic results because social cooperation commonly is necessary for group success and sometimes, especially in the difficult circumstances common in absent-law situations, it is necessary for group survival.

1. The Cost of Subversion. When a group does not follow a path of social cooperation, the results commonly are tragic. The failures of cooperation are instructive because they show the power of cooperation. (The reasons for failures of cooperation are the subject of the next section.)

Compare the experience of the *Grafton*, described above, to that of the *Invercauld*. When the *Grafton* wrecked, the five men aboard worked together from the first moment of danger, protecting its weakest member, dividing jobs according to individual skill sets, and openly discussing the group's plans. Two years later, all five men were healthy when rescued and returned to New Zealand. Recall that soon after the *Grafton* wrecked, the *Invercauld* wrecked on another part of the same island. This group showed little cooperation. The officers held nominal authority but did not use it to effectively engage the group. The weak were abandoned to die where they lay. Before a week passed, some starving members were plotting to eat others. No effort was made to build shelter. Of the twenty-five men who made it to shore alive, only three survived to be rescued. Those three had formed themselves into a cooperative group.[54]

The same dynamic is seen in the two groups that formed after the wreck of the *Batavia*. Jeronimus Cornelisz took control of the main group and sent smaller groups off to other islands supposedly to look for sustenance but in reality to remove competition for the ship's stores, which he held. With a more manageable-sized group, Cornelisz appointed lieutenants to help him consolidate his control by force. In contrast, one of the groups that Cornelisz sent to another island without stores adopted a more democratic and inclusive structure designed to advance group interests. It was led by a common soldier by the name of Wiebbe Hayes. All members shared the work and the food. Their island attracted people who had been sent to other islands, as well as deserters from Cornelisz' group. All deserters were welcomed (except those who murdered at Cornelisz' behest) and as Cornelisz' island ran short of resources and people to coerce to produce more, Cornelisz attempted, unsuccessfully, to take over by force the island of the more democratic group.[55] A rescue party arrived soon thereafter. Of the 120 people who survived the wreck but later died, all were killed by Cornelisz or his henchman.

Consider a similar dynamic in the Jamestown colony, which cycled several times in and out of cooperative periods. The English gentlemen within the group claimed the privilege of not working, yet claimed a share of the food produced by others. Those doing the work saw little reason to support the gentlemen, so there was little incentive to plant crops, build shelter, or dig a well. People soon began dying. John Smith, the only non-gentleman who had been designated one of the seven leaders by those who chartered the expedition, finally took charge of the colony and, among other things, required all to work, or not be fed. During this cooperative period,

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[54] Druet, supra note [7].
[55] Dash, supra note [8].

crops were planted, houses were built, and a well was dug. However, when Smith left the colony to work out trade arrangements with native tribes and to search for a water route to the Pacific, as directed by the colony's charter, power reverted to the gentlemen leaders and the old ways, with members again pursuing their own self-interests. People again began dying. When Smith returned, he again required that everyone work and broke the colony up into smaller, more self-sustaining groups located away from the main colony, where more resources existed. He also forbade private, individual trading with the local natives, requiring that the trading be done as a group. Again, the dying stopped. When Smith later returned to England, people again reverted to their old ways. The following winter has become known as the "starving time." Of the five hundred people Smith left in Jamestown, only sixty made it to the following spring.[56]

On the other side of the world three centuries later, the same dynamic is seen in the Japanese prison camps in the Philippines. One camp, Cabanatuan #1 was famous for its death rate. Hundreds of men died every month of disease, starvation, and abuse. The division between the officers and the men was wide. Officers did not do manual labor, yet ate more than the enlisted men, all of whom did manual labor. When a Marine colonel named Curtis Beecher was transferred to Cabanatuan #1, he insisted that everyone work, and undertook a number of public work projects and programs – from creating a sanitation system and a bathing regime to putting a bounty on flies – and held officers accountable for their men. Within two months of Beecher's arrival, the dying in Cabanatuan #1 had completely stopped, replaced by baseball games, variety shows, and a lecture series.[57]

2. Forces that Can Subvert. The case studies show that, while cooperation may have surprising persistence in even difficult circumstances, it is also true that a variety of forces can frustrate the creation of social cooperation and the social order and success it brings.

For example, peoples' natural deference to authority is usually a force supporting social cooperation. Many of the absent-law stories would not have had a happy ending if people had not deferred to the authority of leaders, as with Colonel Beecher in Japanese camp Cabanatuan #1 or with the captain and Raynal after the *Grafton* wreck. We see the same effect with the island leaders in Anguilla, the elected prisoner council in Attica, and leader Cudjoe in the Maroons.[58] Sometimes, when the original leaders do poorly, the group turns to a different leader and defers to that person, as with John Smith at Jamestown, Weibbe Hayes after the *Batavia* wreck, and Father Damien on Molokai.[59] In each instance, the willingness, even eagerness, to defer to leadership promotes social organization and cooperation.

However, that same tendency to defer can bring disastrous consequences if the leader getting such deference acts in ways against the group's interest.[60] The tendency of Jews in

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[56] Karen Kupperman, Apathy and Death in Early Jamestown, 66 Journal of American History 24 (1979).

[57] Michael Norman & Elizabeth M. Norman, Tears in the Darkness: The Story of the Bataan Death March and Its Aftermath 292 (2009).

[58] See accompanying text at [21 (Japanese Prisoners), 7 (Grafton), 15 (Anguilla), 12 (Attica), and 14 (Maroons)] supra.

[59] See accompanying text at [11(Jamestown), 8 (Batavia), and 17 (Molokai)] supra.

[60] A related example of negative consequences from following others lead may be found in high

(continued...)

Warsaw to defer to the legal but depraved German authority obviously hurt rather than helped them, but may illustrate the force of the human inclination toward defer to authority.[61] In Jamestown, we see deference to the officers appointed by the charter company, even though those gentlemen where ineffective and self-interested. So too with the indifferent superintendent of the Leper Colony on Molokai and the original prisoner officers at the Japanese camp Cabanatuan #1. Until a more effective and group-interested leader appears and takes charge, the group simply defers, and dies. Of course, a more benevolent leader might never appear, as in the *Invercauld*, where the deference and the dying simply continued.

In some instances, the malevolent leader took control by force, as with Cornelisz in the *Batavia*, Comstock in the *Globe*, and Pablo Escobar in Colombia, and it often will be difficult to overcome such malevolent leaders once they are in power. It took the rise of the more democratic Hayes' group in the *Batavia*, the murder of Comstock in the *Globe*, and the terrorism of Los Pepes in Colombia to break the malevolent rule.[62]

Some factors may tend to insulate the group from the forces that would subvert social cooperation. A prior close relationship among the group before encountering the absent-law situation is likely to help. Several of the success stories show this mark. In the Andes crash, the group were members of a rugby team, their friends, families, and fans. On Anguilla, the group had already been living as a community before the British withdrawal. On the *Grafton*, the captain and Raynal had previously been good friends, and together hired the other crew members.

Also helpful in insulating a group from cooperation-subverting forces are the demands of a common goal. The gold miners simply could not mine without group cooperation, because they could not leave their goods unattended unless they had some effective social rules in place that would protect them from theft. The challenging task for pirates, to take a prize ship, or for wagon trains, to cross a dangerous country, could not have been achieved without cooperative action. Sometimes the common mission was simply to stay alive. The prisoners at Treblinka, the Eskimos, and the Maroons all lived in conditions in which their survival depended upon

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[60] (...continued)
visibility looting, such as occurred in the Detroit riots of 1971 and in the aftermath of Hurricane Katrina.

[61] There has been a good deal of discussion of the Jew's willingness to defer despite the obvious evilness of the laws and directions. For insight into these issues, see Jewish Resistence to the Nazi Genocide, found at http://www.jewishvirtuallibrary.org/jsource/Holocaust/grobres.html last accessed on January 17, 2012.

[62] See text accompanying text notes [8 (Batavia), 6 (Globe), 27 (Colombia)] supra.

The problem of the malevolent leader is illustrated too by the situation in Somalia, but in reverse. Somalia certainly continues to have its difficulties, but since the last functioning government fell in 1991, the economy of the nation has improved. With the "predatory government" gone people retain more of what they work for and, as a result, some areas of Somalia are experiencing “unparalleled boom” times. Peter Lesson, Better off Stateless: Somalia Before and After Government Collapse, 35 Journal of Comparative Economics 689, 706 (2007). Additionally, personal liberty has increased greatly. Gossip had been a capital offense. "Twenty other basic civil freedoms involving speech, association, and organization also carried the death penalty. People were not able to pursue complaints against those who harmed them nor were they free to move about physically. Now, free speech, a real ability to voice concerns, and even newspapers exist in Somalia." Id. Several attempts have been made since 1991 to establish a functioning government. Each time a transitional government is formed, the life indexes of the Somali people fall. As the time without a government lengthens, key life indexes such as infant mortality and income improve. Little, supra note [24], at 5-12.

sustained cooperation, which made it more difficult for a malevolent leader to take control and undermine group interests. It was common that the more difficult the conditions, the more likely the cooperation.[63]

The ironic corollary to this is that the danger to social cooperation may increase as the group's situation becomes more comfortable. This may be why, in conflict with Hobbes' claim that government and law are needed to produce social order and organization, one may sometimes see less social cooperation in an effective-law situation than in an absent-law situation, not more. The existence of a legal system can provide a level of support and well-being that may seem to undermine the tendency toward personal sacrifice in support of cooperative action.

C. The Justice Principle

A second recurring theme found in the case studies is the wide-spread desire that serious wrongdoing be punished. Both those who have been victims as well as those who are uninvolved third parties appear willing to make personal sacrifices to assure that justice is done, despite their difficult circumstances.

1. Altruistic Punishment. In the gold mining camps, for example, wrongdoing was adjudicated before a congregation of the camp members even though this meant taking them away from their mining. This was at a time when mining fever was in full swing and nothing distracted the miners from their gold rush, not socializing, romance and marriage, sports or hobbies, education, or any of the other normal non-work activities of a community. Yet even gold mining was set aside for participation in the adjudication of wrongdoing.

This interest continued even after the development of governmental mechanisms for adjudications by the appointment of a local "Alcalde." In one case where a mining partnership broke up, one of the men, Sim, sought to cheat his partner, Sprenger, out of his half of the claim. The local Alcalde accepted a bribe from Sim to find in his favor. Upon hearing the verdict, the camp felt that justice was not served and called other camps in the area to come to help resolve the matter. The larger group assembled and demanded that the Alcalde re-open the case. When he refused, they constituted themselves as a "court of appeals" and summoned the case records from the Alcalde. When he refused, they re-tried the case, overturned the original finding, found instead for Sprenger, and found Sim guilty of perjury.[64]

On the wagon trains going west, the distances were long and delays were costly. The group had to keep moving to find fresh grass for their animals and to cross the Rockies before snow shut the mountain passes. Groups sometimes moved on even though they had to leave behind sick or injured who needed a few days to recover before they could travel. Yet, despite the cost, it was not uncommon for a wagon train to stop to conduct a trial of a wrongdoer. Even another wagon train, which had no prior involvement with the group, would delay travel so that their members could serve on a jury for the adjudication of a serious case.[65]

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[63] Walter O. Weyrauch, The Experience of Lawlessness, 10 New Crim. L. Rev. 415, 430 (2007).
[64] Shinn, supra note [9], at 194.
[65] Abigail J. Scott, Journal of A Trip To Oregon,

(continued...)

In one of the barracks of the Nazi extermination camps, there was a unknown "bread thief." The stronger people in the group were not the ones who were being robbed but even they joined in a watch system to catch the thief, a watch system that required undernourished, exhausted people to give up hours of precious sleep. The watch was held until the thief was caught.[66] The penalty for thievery was death and, as Des Pres explains, the community sanctioned the punishment. "If a man stole your food you killed him. If you were not strong enough to carry out the sentence yourself, there were other executioners."[67]

In the Warsaw ghetto, an underground resistance movement eventually developed, which used its scarce resources to inflict casualties on the German units that came into the Ghetto. Many of the underground's members were caught, tortured, and killed. Despite the risks incurred in any action and the scarcity of ammunition, the group devoted some of its energies to killing Jews who had collaborated with the enemy, even though such actions diverted resources from more strategic actions against the enemy. They thought that doing justice, as they saw it, was worth the cost.[68]

The members of the original San Francisco Vigilance Committee put themselves at risk by their undertaking, even though they had no personal stake in the cases the Committee sought to correct. While the legal authorities at the time were highly corrupt and worked for the criminals rather than the public, they nonetheless controlled the official power of government and its agents. Several members of the Vigilance Committee were arrested and tried for their work in trying to do justice where the corrupt authorities had been bought off. After several members of the Vigilance Committee were held criminally liable. The Committee responded by publishing a list of all its members. "All the undersigned have been equally implicated, and are equally responsible with their above named associates."[69]

These experiences are consistent with social science research that shows the strong desire among lay persons that serious wrongdoing be punished. This has been shown through a wide variety of methods: questionnaire studies,[70] behavioral economic studies,[71] and cross-cultural

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[65] (...continued) http://cateweb.uoregon.edu/duniway/notes/DiaryProof1.html (last visited, Dec. 28, 2011).

[66] Des Pres, supra note [49], at 159; Eugen Kogan, The Theory and Practice of Hell: The German Concentration Camps and the System Behind Them 135 (1950).

[67] See Des Pres, supra note [49], at 141.

[68] Gutman, supra note [20], at 170

[69] Williams, supra note [9], at 217.

[70] See studies reviewed at Paul H. Robinson & Robert Kurzban, Concordance and Conflict in Intuitions of Justice, 91 Minn. L. Rev. 1829, 1848-1853 (2007) [hereinafter *Robinson & Kurzban, Concordance*] (reviewing Craig L. Boydell & Carl F. Grindstaff, Public Opinion Toward Sanctions for Crimes of Violence, 65 J. Crim. L. 113 (1974); Marvin E. Wolfgang et al., The National Survey of Crime Severity (1985)).

[71] Robinson & Kurzban, id. (discussing Colin Camerer, Behavioral Game Theory: Experiments *in* Strategic Interaction (2003) (see especially Chapter 2); Daniel Kahneman et al, Fairness and the Assumptions of Economics (Part 2), 59 J. Bus. S285, S285-S300 (1986); Ernst Fehr & Urs Fischbacher, Third-Party Punishment and Social Norms, 25 Evolution & Hum. Behav. 63 (2004) [hereinafter *Fehr & Fischbacher, Third-Party*]).

studies.[72] Neurobiological studies demonstrate the association of the punishment of violators with a direct positive hedonic impact through activation of the human brain's reward system.[73] The intuition that wrongdoing should be punished applies not only to those who have been wronged but also to uninvolved third parties, what is termed in the literature "altruistic punishment."[74] Cultural psychologist Paul Rozin and his colleagues conclude that, "Moral judgment and the condemnation of others, including fictional others and others who have not harmed the self, is a universal and essential feature of human social life."[75] Similar sentiments have been expressed by developmental psychologist Jerome Kagan, who includes this intuition as one of "a limited number of universal moral categories that transcend time and locality."[76] Anthropologist Donald Brown, in his exhaustive review of the cross-cultural data, included intuitions surrounding justice and punishing transgressors as a "Human Universal."[77] In short, experts from multiple disciplines have been unambiguous in their assertion that, despite cultural differences, the intuition to punish is a key aspect of what it means to be a member of the human species.

Existing studies also support the view that people agree not only that serious wrongdoing should be punished but also agree on the relative seriousness of wrongdoing, at least with regard to the core of wrongdoing – physical aggression and taking propriety of another without consent. One recent study showed enormous agreement about the relative blameworthiness of offenses

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[72] Id. (discussing Ultimatum Game, see Joseph Henrich et al., Economic Man in Cross-cultural Perspective: Behavioral Experiments *in* 15 Small-Scale Societies, 28 Beh. & Brain Sciences 795 (2005); John R. Snarey, Cross-Cultural Universality of Social-Moral Development: A Critical Review of Kohlbergian Research, 97 Psychol. Bull. 202, 213 (1985)).

[73] Dominique J. F. De et al., The Neural Basis of Altruistic Punishment, 305 Science 1254 (2004). See also Brian Knutson, Sweet Revenge?, 305 Science 1246 (2004).

[74] Ernest Fehr & Simon Gachter, Altruistic Punishment in Humans, 415 Nature 137 (2002); Frank W. Marlowe et al, More "Altruistic" Punishment in Larger Societies, 275 Proc. Royal Society B 587 (2008); Fehr & Fischbacher, Third-Part, supra note [76]. See authorities review in John M. Darley and Thane S. Pittman, The Psychology of Compensatory and Retributive Justice, 7 Personality and Soc. Psych. Rev. 324, 329-331 (2003). See also Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications For Criminal Law And Justice Policy, 81 Southern California L. Rev. 1, 59 (2007) [hereinafter *Robinson & Darley, Implications*] .

[75] Paul Rozin et al., The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity), 76 J. Personality & Soc. Psychol. 574, 574 (1999). For a discussion of some psychologists (and others) who want to abolish punishment, see Steven Pinker, The Blank Slate 181 (2002).

[76] Jerome Kagan, The Nature of the Child 118 (1984).

[77] Donald E. Brown's Human Universals represents perhaps the best anthropological account of cross-cultural similarities. In his description of the Universal People (UP), his description of those features that all people from all cultures share in common, he writes: "The UP have law, at least in the sense of rules of membership in perpetual social units and in the sense of rights and obligations attached to persons or other statuses. Among the UP's laws are those that in certain situations proscribe violence and rape. Their laws also proscribe murder, unjustified taking of human life (though they may justify taking lives in some contexts). They have sanctions for infractions, and these sanctions include removal of offenders from the social unit whether by expulsion, incarceration, ostracism, or execution. They punish (or otherwise censure or condemn) certain acts that threaten the group or are alleged to do so." Donald E. Brown, Human Universals 138 (1991).

within the core of wrongdoing across demographics.[78] This suggests that something powerful is at work here, if it is beyond the influence of forces like gender, race, age, education, economic status, marital status, and other such demographics that affect people's life experience. Again, a wide variety of studies, both domestic[79] and cross-cultural,[80] support the conclusion. In their review of the literature, Rossi and Berk suggest that the studies converge on the view that people share intuitions about the relative seriousness of wrongdoing.[81] There is a "[f]airly strong consensus on the seriousness ordering of crimes."[82]

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[78] See Robinson & Kurzban, Concordance, supra note [75], at 1866-1880.

[79] See studies reviewed at id. at 1854-1861 (reviewing Thorsten Sellin & Marvin E. Wolfgang, The Measurement of Delinquency 268 (1967); Joseph E. Jacoby & Francis T. Cullen, The Structure of Punishment Norms: Applying the Rossi-Berk Model, 89 J. Crim. L. & Criminology 245, 263 (1998) (concluding that there was "considerable agreement across various demographic groups on the relative severity of the sentences to be imposed for different offenses, but disagreement over the absolute magnitude of these sentences."); Alfred Blumestein & Jacqueline Cohen, Sentencing of Convicted Offenders: An Analysis of the Public's View, 14 L. & Soc. Rev. 223, 229 (1980); Peter H. Rossi et. al, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev. 224, 230 (1974); V. Lee Hamilton & Steve Rytina, Social Consensus on Norms of Justice: Should the Punishment Fit the Crime?, 85 Am. J. Soc. 1117, 1124 (1980) ("a high level of consensus."); Thomas, Charles, Robin Cage & Samuel Foster, "Public Opinion on Criminal Law and Legal Sanctions: An Examination of Two Conceptual Models," 67 J. Crim. L. & Criminology 110, 112 (1976) ("Evidence of a remarkable level of consensus, even after separating the sample on the basis of their sex, race, age, income, occupational prestige, and educational attainment")).

[80] See studies reviewed at Robinson & Kurzban, Concordance, supra note [75], at 1862-1865 (reviewing Michael O'Connell & Anthony Whelan, Taking Wrongs Seriously: Public Perceptions of Crime Seriousness, 36 Brit. J. Criminology 299, 302-04 (1996); Marlene Hsu, Cultural and Sexual Differences on the Judgment of Criminal Offenses: A Replication Study of the Measurement of Delinquency, 64 J. Crim. L. & Criminology 348, 350 (1973); Graeme Newman, Comparative Deviances: Perception and Law in Six Cultures 140 (1976); David M. Bersoff & Joan G. Miller, Culture, Context, and the Development of Moral Accountability Judgments, 29 Developmental Psychol. 664, 666 (1993)).

[81] See, e.g., Peter H. Rossi & Richard A. Berk, A National Sample Survey: Public Opinion on Sentencing Federal Crimes 193 (1995) (discussing sentencing, but in absolute, and not relative terms); Peter H. Rossi & Richard A. Berk, Varieties of Normative Consensus, 50 Am. Soc. Rev. 333 (1985) (in their review of the literature up to this point they concluded that "fairly strong consensus on the seriousness ordering of crimes, with those involving actual or threatened physical harm to victims generally considered to be the most serious . . ."); Peter H. Rossi & Richard A. Berk, A Conceptual Framework for Measuring Norms, in The Social Fabric: Dimensions and Issues 103 (James F. Short, Jr. ed., 1986) (present models on consensus and have "attempted to lay the foundations for exploring normative structures based on both technical and conceptual tools"); Peter H. Rossi & P.H. Henry, Seriousness: A Measure for all Purposes?, in Handbook of Criminal Justice Evaluation (Malcolm W. Klein and Katherine S. Teilmann, eds., 1980). Rossi & Berk claim that "[m]odel V more or less describes the majority of, if not most, normative domains in our society. People by and large agree on what the norms are but differ in their degrees of attachment to the normative structure so defined." Rossi & Berk, 50 Am. Soc. Rev. 333, 340 (1985). See also id. at 339 ("Under this condition, individual members of the society need not agree on the specific judgments to be rendered on each moral application, but each individual can be different from the others by a specific constant . . .").

[82] Peter H. Rossi, Richard A. Berk, Just Punishments: Federal Guidelines and Public Views

(continued...)

2. Commitment to Justice Includes Avoiding Injustice. The strong human commitment to doing justice produces not just a demand for punishment but also an intuition of justice that sets the extent of punishment to match the extent of the offender's moral blameworthiness, including the seriousness of the offense, as people see it.[83] Furthermore, empirical studies confirm lay person's specific and nuanced intuitions of justice on a wide array of criminal law issues – essentially all of the issues that can arise if one were drafting a criminal code.[84]

Despite the difficult circumstances, the absent-law groups commonly adhere to such principles of justice: both the recognition of mitigations and exculpations and adherence to a principle of proportionality between punishment and blameworthiness. In the mining camps, for example, a minor infraction, such as deception in a horse sale, might be sanctioned with a fine. A more serious offense, such as moving tools which marked another's claim, might prompt a more serious penalty, such as a whipping or banishment from the camp. The most serious offenses, large-scale theft or murder, were more likely punished with death.[85] Similarly, in Jamestown under John Smith, a man who would not work was not given food, a person who disobeyed orders was placed in chains, and a person found guilty of theft of stores was killed.[86] Crews on pirate ships commonly wrote up articles by which they would govern themselves, and many of these codes set out punishments for offenses. One set of articles differentiated between theft from an individual – for which the punishment was "slitting the ears and nose of him that was guilty, and set him on shore, not in an uninhabited place, but somewhere where he was sure to encounter hardships" – and theft from the group, a much more serious offense – for which the punishment was marooning, which meant death.[87] The Netsilik eskimos also had the punishment fit the crime. Insufficient sharing of stores might prompt a public scolding by the older women of the group, while excluding others from a hunting area might prompt a community-authorized beating, and taking another's wife might merit being killed.[88]

Also apparent in the case studies is the recognition of a variety of defenses and mitigations. This may seem quite odd at first, as a refinement one would not expect in the

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[82] (...continued)
Compared 12 (1997). See also Sellin & Wolfgang, supra note [75], at 324.

[83] Paul H. Robinson & John M Darley, Justice, Liability, and Blame: Community Views and the Criminal Law, ch. 6 (1995).

[84] See, e.g., id. at ch. 3-5; Robinson & Kurzban, Concordance, supra note [75], at 1854-1865; Paul H. Robinson et al., Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory, 89 Texas Law Review 291, 335-47 (2010); Paul H. Robinson & John M. Darley, Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory, 18 Oxford Journal of Legal Studies 409 (1998); Paul H. Robinson & John M. Darley, Testing Competing Theories of Justification, 76 North Carolina L. Rev. 1095 (1998); Paul H. Robinson et al., Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment, Vanderbilt Law Review (forthcoming 2012).

[85] Shinn , supra note [9], at 119.

[86] Richard Price, supra note [14], at 145-148.

[87] Don Carlos Seitz, Under the Black Flag: Exploits of the Most Notorious Pirates 195 (2002).

[88] Asen Balikci, The Netsilik Eskimo 185 (1970); Geert van den Steenhoven, Legal Concepts Among the Netsilik Eskimos of Pelly Bay 28-61 (1959).

difficult circumstances common in many absent-law situations. There are good utilitarian reasons to punish prohibited conduct, but recognizing defenses or mitigations to punishment suggests that the decision-makers are primarily concerned with desert. That is, providing defenses and mitigations to one who has engaged in prohibited conduct tends to undermine general deterrent effect of the prohibition as well as the incapacitation of potential offenders.[89] But if doing justice is the concern, it can be as easily offended by giving too much punishment as too little.[90]

For example, one sees the use of culpability requirements giving rise to mistake defenses. In the Andes plane crash, a man, Harley, was discovered to have a private stash of toothpaste, which typically was part of the group's food stores. At his "hearing" before the group, it was determined that he was mislead by another man, Delgado, who had told him that the toothpaste was not part of the group stores and that he could properly trade it to Harley. Harley's plea, essentially one of honest mistake, was accepted and he was judged not liable.[91]

In a pirate case, three officers aboard a ship removed clothing from the common loot to make themselves look good for the ladies in the town. When they returned to the ship, they were brought before the group to answer for theft. The officers were let go with a warning when the group was persuaded that they had meant only to borrow the clothing for the night.[92] (This is consistent with the legal law requirement that theft requires an intent to *permanently deprive* another of his property.[93])

Justification defenses, such as lesser evils and self-defense, also were commonly recognized. In a wagon train case, one man attacked another, who defended himself with a knife strike. The attacker died within minutes. At a hearing before the group, the man was found not guilty, upon a claim of self-defense.[94] Excuse defenses too were recognized. On the *Globe*, one

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[89] Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much?, 73-95, 109-134 (2008) [hereinafter *Robinson, Distributive Principles*].

[90] Id. at 135-212.

[91] Read, supra note [5], at 216.

[92] William Snelgrave, A New Account of Some Parts of Guinea, and the Slave-trade, 257 (1734). For another example, from the mining camps, two men take a set of old and useless tools that seemed to them abandoned, they claimed. Tools are used to mark claims and taking them is considered claim jumping, a most serious, often capital offense. In this case the men were whipped and told to leave the camp. Their mitigated sentence was based upon their belief that the tools were so old and useless that they believed they were just abandoned, and did not mark a claim. Shinn, supra note [9], at 172 (camp members were told that in future they must leave higher quality of tools to mark their claim).

[93] Paul H. Robinson, Criminal Law 615 (2nd ed. 2012).

[94] Abigail Jane Scott, Journal of a Trip to Oregon, July 15th entry (1852). http:/cateweb.uoregon.edu/duniway/notes/DiaryProof1.html (last accessed on September 12, 2011). For another example, during hurricane Katrina, several well-organized, otherwise lawful groups participated in planned looting expeditions and took up residence in public buildings, yet were never prosecuted for their offenses. Stephen Kiehl, Some Stay to Save; Some Come to See, Baltimore Sun, September 11, 2005. Similarly, at Memorial Hospital, patients were given lethal injections of morphine, so that they might die peaceful painless deaths. A New Orleans grand jury declined to indict the doctor on second-degree murder charges, and the case faded from view. See Fink, supra note [23].

In one of the wagon train cases, the president of the group has commanded that the teams not cross a stream until direction is given for them all to cross together. When one team moves to do so in

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man to help the mutineers was Gilbert Smith, including help to commit crimes against the non-mutinous crew. Yet when the non-mutineers were back in control, Smith was not punished in any way, apparently on the theory that he had been coerced to participate and would have been killed himself had he not.[95] During the Attica prison uprising, the prisoners appointed a leadership committee to judge violations of the rules that the prisoners had set for themselves. When one of the prisoners, Michael Privitiera, violated the rules by attacking a hostage, it was determined that he was mentally ill. Rather than kill him, which was the punishment called for under the rules, they pursued their own form of civil commitment by detaining him in "D" block. When he subsequently left "D" block and assaulted a fellow prisoner, he is brought back before the committee and again sent to "D" block for detention.[96] Indeed, even an excuse for duress of circumstances seems to have been recognized, even though it goes beyond the excuses commonly available in modern criminal law (which may suggest the need to reevaluate this aspect of modern doctrine).[97]

3. Just Punishment as a Necessary Condition for Stable Social Cooperation. The commitment to doing justice, and to avoiding injustice, at least as the circumstances permitted and as the group viewed it, has a practical value, even if it is not apparent to the persons caught in the absent-law situations. The case studies suggest that such attempts to do justice are probably a prerequisite to effective and stable social cooperation. In the early years of the colony on Pitcairn Island, the mutineers who settled there were unable to sort out a credible means of resolving disputes; killings among the group eventually left only one adult male alive.[98]

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[94] (...continued)
violation of the order, men are sent with instructions to shoot the violators if they will not stop. However, when the violators are confronted yet will not stop, the men sent decline to shoot them. Lloyd W. Coffman, Blazing a Wagon Trail to Oregon: A Weekly Chronicle of the Great Migration of 1843 38 (1993).

On Pitcairn Island an outsider by the name of Joshua Hill had been elected to be head of the island council. He runs an ever more tyrannical government on the island, including flogging one man for an adultery act that occurred before Hill was even on the island. When Hill tries to get the community to help him sanction two women guilty of spreading rumors about himself he ends the meeting with a prayer. No one but Hill says "amen." Shortly after the prayer, Hill sentences a twelve year old to death for stealing yams. The child's father is commanded to kill her; he refuses. Hill attacks the father with a sword. Hill is disarmed, the father unharmed, and Hill finds his authority on the island has disappeared. Rosalind Amelia Young, Mutiny of the Bounty and the Story of Pitcairn Island, 1790-1894, 78 (1894).

[95] Comstock, supra note [6], at 87- 93.

[96] Useem, supra note [12], at 49. When he later attacked another prisoner, the council apparently concluded that he could not be controlled, so he was stabbed to death. Wicker, supra note [12], at 169.

[97] Compare MPC §3.02 (lesser evils), which allows a justification defense whenever the offense conduct avoids a greater harm, to §2.08 (duress), which allows an excuse defense only for coercion applied by another person, not by natural circumstances; Robinson, Criminal Law, supra note [98], at 304 (duress defense will only apply if coercion is inflicted by a human source, rather than a force of nature).

[98] Marks, supra note [16], at 15-17. Other examples similarly illustrate the point. In the late 1600's, the distinction between privateer work, where the crown authorised the taking of enemy ships for the profit of the owners of the ship and illegal seizures, became more and more difficult to discern even
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It is the absence of a credible justice system that gives rise to vigilantism. In San Francisco, when legal authorities showed themselves to be unreliable – deciding liability and punishment on whim or for corrupt purposes – the citizens formed their vigilance committee, which took over criminal justice, even denying authorities access to suspects.[99] The lack of credibility of the Pakistani criminal justice system meant that vigilantism was increasingly a problem, such as the 2008 incident in Karachi where three young thieves were beaten and set afire by an angry mob.[100]

A situation in which injustices, as perceived by the group, are regularly inflicted or where failures of justice, as perceived by the group, are regularly tolerated, is a situation in which the group members are likely to have little allegiance to the group or its interests. They may continue their membership as necessary to survive but are not likely to identify with the group and join in its goals as a joint enterprise. Instead, their weak bond will mean their dropping out of the group when a better option presents itself – such as an opportunity to join a more just group, even if it has fewer resources.[101]

Recall the *Batavia* case. Once it was clear that Cornelisz was a corrupt leader who punished only to advance his own interests, people began defecting. Cornelisz had to put guards on the boats to stem the defections to the other, more democratic group. In contrast, no one on the other island ever attempted to join Cornelisz, even though he had the resources and they were at times near-starving.[102] On the whale ship *Globe*, when the mutineers under Comstock took over, the other sailors felt compelled to obey and all hands continued to sail the ship, following directions and fulfilling their usual duties. But when Comstock was killed and before a new strongman could establish himself, the crew members cut the anchor ropes and abandoned the mutineers on a remote tropical island.[103]

Indeed, it was a history of unfairness and excess in the discipline systems aboard naval ships of the day that helped prompt the rise of piracy. Veterans offered new men on a naval ship this advice: "There is no justice or injustice on board ship . . . . There are only two things: duty

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[98] (...continued)
to the courts. As the courts and different nations debated the distinctions, the golden age of piracy came into being. The crews who took the risks and the prizes kept the income. Peter T. Leeson, The Invisible Hook: the Hidden Economics of Pirates 30 (2009) [hereinafter *Lesson, invisible hook*]. On the island of Molokai, many of the superintendents of the leper colony were criminals who used their power to abuse the residents. These men were not able to control the lawful residents without withholding food or supplies and they could not control the unlawful exiles through any means. Tayman, supra note [17]. In Colombia, during the time of Pablo Escobar corruption was so wide spread as to make it appear that everyone was taking bribes and therefore to not take bribes was not morally upright rather it was foolish. Roy Godson, Menace to Society: Political-Criminal Collaboration Around the World 72-94 (2003).

[99] Williams, supra note [9], at 205.

[100] Richard Blue et al, Pakistan Rule of law: Assessment - Final Report 11 (2008), available at http://www.usaid.gov/pk/downloads/dg/Pakistan_ROL_11-26-08.pdf.

[101] Others have talked in more detail about the "member exit problem" for groups. See, e.g., Hoffman, *supra* note [43], at 1673-4.

[102] Joseph Cummins, Cast Away: Lost and Found in History: Epic True Stories of Shipwreck, Piracy and Mutiny on the High Seas 73 (2008).

[103] Comstock, supra note [6], at 106-107.

and mutiny . . . . All that you are ordered to do is duty. All that you refuse to do is mutiny."[104] Serving on a Spanish ship in 1693, during a voyage of serious mistreatment, Henry Avery was the first to incite mutiny among the crew and take the ship for pirating. The pirate crew often performed the same tasks as they had performed previously as the crew of an authorized privateer – taking other ships as lawful prizes – but now worked under different financial and disciplinary regimes. The pirate crews created democratic communities. Elected captains remained in office only so long as they had the support of the crew. All understood that strong discipline was required, especially if the ship was to be successful in its hunting and confrontations. But the needed discipline was created through means other than arbitrary and excessive punishment. The disciplinary system had to be effective for the demands of successful pirating, yet viewed as sufficiently fair to attract a crew. Most of the pirate crews were volunteers, and could and would leave a ship if they were dissatisfied. Only a reputation for fair discipline would attract a crew for the ship's next outing.[105]

The available social science studies support the view that doing justice is necessary for social cooperation. As previously noted, a substantial body of evidence supports the notion that most humans are not selfish, as previously assumed, but rather are strong reciprocators.[106] Strong reciprocators are predisposed to cooperate but not if others in their group refuse to and act only in self-interest. Moreover, strong reciprocators have a desire to punish uncooperative individuals who violate social codes to promote their self-interest. They will punish violators even it is personally costly to them and, indeed, even if they expect no personal direct or indirect benefit from their expenditure[107] For example, experiments show that strong reciprocators will punish others, at a significant cost to themselves, even during their final interaction with the group, when it is clear there will be no repeat interaction that will allow them (the punisher) to be repaid or to otherwise benefit from their costly behavior.[108]

There is a limit to what laboratory games where a few dollars are at stake can tell us about human decisionmaking in difficult real-world situations, where life or death may be an issue, but the games can be interesting and instructive. For example, they suggest that in groups that consist of both self-interested individuals and strong reciprocators, punishment opportunities allow the group to create a system of checks and balances that encourages cooperation by all.[109]

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[104] Peter Leeson, An-arrgh-chy: The Law and Economics of Pirate Organization, 115 Journal of Political Economy 1049, 1060 (2007) [hereinafter *Leeson, An-arrgh-chy*].

[105] See Leeson, Invisible Hook, supra note [102], at 30.

[106] See text accompanying notes [51-58].

[107] Fehr & Gintis, Human Motivation, supra note [32], at 45-6; Herbert Gintis, Strong reciprocity and human sociality, 268 Journal of Theoretical Biology 141, 141 (2011); Burnham & Johnson, supra note 53, at 114; Ernst Fehr & Simon Gachter, Altruistic Punishment in Humans, 415 Nature 137 (2002); Fehr & Fischbacher, supra note [51], at 785.

[108] Fehr & Gintis, id.

[109] As Fehr and Gintis explain it:

> When punishment opportunities are available strong reciprocators can now punish the defectors directly, creating an economic incentive for the self-regarding subjects to cooperate. Moreover, the strong reciprocators will also cooperate because they need not fear others' defection, as the self-regarding individuals are disciplined. Thus, the strong reciprocators induce the self-regarding subjects to cooperate in the presence of a direct punishment opportunity.

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Without punishment, selfish behavior does not bear an obvious cost and thus there is little incentive for the self-interested to cooperate, and thus every reason for the strong reciprocators to stop cooperating to avoid being taken advantage of. That is, the selfish will persist in taking advantage of the group in order to promote their own self-interest; and the strong reciprocators, once they see the unpunished non-cooperative behavior, will cease to cooperate. The introduction of punishment changes all this. Given the threat of punishment, cooperation becomes the best method for selfish individuals to promote their self-interest; and strong reciprocates also will cooperate because the punishment eliminates their fear of being taken advantage of. Thus, the studies show, the introduction of punishment significantly increases the level of cooperation of all group members, and the absence of just punishment undermines the possibility for group cooperation.[110]

D. Subverting Justice

The case studies also suggest that, while people have a deep desire for justice and are willing to make personal sacrifice to see it done, there are limits to those willing sacrifices. Justice is important, but survival is more important.

1. Subversion. If the situation is such that the success of the group requires letting wrongs go unpunished to preserve the group's stability and strength, some failures of justice will be tolerated. For example, the person who deserves punishment may have a central role in the group's survival plans, which might be upset if punishment is imposed. Or, giving deserved punishment may be unwise because it may upset or create discord at a time when absolute harmony is essential. The group must weigh the costs and benefits of discipline under the then-existing conditions.

Among the survivors of the Andes crash, for example, one man was viewed as lazy and did not perform his share of the duties. The group decided that any person not doing their assigned work would not be allowed to eat. But when the man still did not work, the group relented and let him eat anyway. It was judged that denying him food would be too disruptive to group's morale at that point. In a later incident, the same man was caught sneaking food while helping to prepare it (cutting in strips the flesh of passengers who had died). Again, it was decided that, while food theft was a serious offense within the group, the offense should be overlooked because unity among the group was essential at that point. (Such minor sneaking

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[109] (...continued)
Fehr & Gintis, Human Motivation, supra note [32], at 50; see also Armin Falk, Gift-Exchange in the Field, 75 Economica 1501 (2007); Amin Falk et al., Homo Reciprocans: Survey Evidence on Behavioral Outcomes, 119 Economic Journal 592 (2009); Joseph Henrich et al., In Search for Homo Economicus: Behavioral Experiments *in* 15 Small-Scale Societies, 91(2) Am. Econ. Rev. 73 (2001); Joseph Henrich et al., "Economic Man" In Cross-Cultural Perspective: Behavioral Experiments *in* 15 Small-Scale Societies, 28 Behav. Brain Sci. 795 (2005); Joseph Henrich et al., Costly Punishment Across Human Societies, 312 Science 1767 (2006); Charles Bellemare & Sabine Kroger, On Representative Trust, Discussion Paper 2003-47, Tilburg University, Center for Economic Research (2003).

[110] Fehr & Gintis, Human Motivation, supra note [32], at 50.

came to be tolerated among those who did the strip-cutting because the task was seen as so unpleasant.[111])

In the Attica Prison case, as noted previously, a mentally ill convict was segregated and detained after assaulting a hostage and another prisoner – the group's form of an insanity defense leading to civil commitment. But when the man assaulted yet another prisoner, the group felt they could not control the man and finally had him killed.[112] Similarly, the Attica group agreed on a prohibition against sexual activity. Yet, when it became clear that the rule could not be successfully enforced, the persons engaging in sexual activities were simply told to do it in a specified, limited area.[113]

In 2002, the ancestors of the mutineers who took over Pitcairn Island were revealed to outsiders as having regularly engaged in widespread sexual abuse of children. It appeared that most of the women on the island had suffered abuse, but almost none were willing to press charges and none were willing to give testimony in aid of the prosecution of their abusers. While they might have agreed that the rapes were wrongful, they nonetheless believed that jailing the offenders would cause harm to the island community. The accused persons included many officials on the island – the mayor, the former magistrate, and the chairman of "internal committee" – and others who ran the long boats that shuttled people and cargo between ships and the island, upon which the livelihood of the residents depended. The women judged that the island simply could not afford to have these men jailed.[114]

Among the Netsilik hunters, there was some considerable sensitivity about personal insults. An insult could prompt a lethal response, especially if it disparaged another's hunting ability. The community saw such macho killings as unfortunate but typically would not involve themselves in them. The community could not afford to lose a good hunter, especially if another one had just been killed.[115]

The reverse sort of subversion of justice also occurred – a group's circumstances might lead them to impose more punishment that they really believed was deserved. For example, in the early Maroon communities, death was the punishment for nearly all infractions. This was not because the community thought that all violations deserved the same punishment but rather probably reflected their view that there existed few possibilities for lesser sanctions and the community could not afford to have disaffected members in their midst if they were to survive their ongoing conflict with the British.[116] During Prohibition, many officials, including President Harding, regularly violated the liquor laws, yet were not prosecuted. The enforcement officials reasoned, probably correctly, that to expose the President's and other officials' violations would

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[111] Read, supra note [5], at 220. When it becomes clear that they may be stranded for a long time, the group outlaws the practice whereby those who cut up the dead bodies, a dreaded task, get extra food. While the group makes the rule, nothing is done to enforce it.

[112] Useem , supra note [12], at 49.

[113] Wicker, supra note [12], at 231.

[114] Marks , supra note [16], at 103. In fact, outside pressure forced the prosecution of the men, most of whom served their sentences (of two years or less) in the local jail, which the men had to build before they could occupy it. Marks, supra note [16], at 9.

[115] However, the community also would not punish the revenge killing by the victim's family.

[116] Mildred M. Chang, The Jamaican Accompong Maroons: Continuities and Transformations 87 (2007).

undermine the perceived legitimacy of the prohibition and sink any hope of effective enforcement.

2. Reversion. While circumstances sometimes caused a deviation from the justice principle, the case studies suggest that when circumstances changed, it was common for the principle of justice to reassert itself and for deserved punishment to be imposed. After the Maroons came to terms with the British and other punishment possibilities became more easily available, they dropped their use of the death penalty for lesser offenses and substituted lesser sanctions, such as banishment, whipping, and removal from a position of responsibility.[117] When, with access to guns, medicine, metal (for knives, sled runners, etc.), and standard trading goods, the Netsilik people were able to step back from the brink of starvation, they reverted to a punishment practice that more closely matched their notions of justice. For example, they no longer tolerated insult-killings.[118] Similarly, the public (and family) tolerance of prostitution during the Soviet-occupation of Berlin ceased once food became available at regular markets.[119] When the soaring crime rate that gave rise to the popular San Francisco Vigilance Committee was tamed, the Committee disbanded itself of its own accord.[120]

This pattern of reversion in the case studies is consistent with what we know from empirical studies. For example, in one recent study, subjects were asked to "sentence" an offender who had assaulted another and, in some variations, remained dangerous because of a brain tumor. Manipulations allowed the researchers to tease out whether the subjects looked to desert criteria or to incapacitation-of-the-dangerous criteria in doing their sentencing. The authors concluded that the subject's default judgment was to look to desert.[121] Some subjects could be diverted from desert, however, to take some account of dangerousness in sentencing, if they were made to feel sufficiently at risk by the dangerous person being released from all control. But they promptly reverted to pure desert criteria when the dangerousness threat receded, either because of a successful operation to remove the brain tumor or because of the availability of civil commitment.[122]

III. IMPLICATIONS FOR MODERN CRIMINAL JUSTICE

The dynamics of cooperation and justice in the absence of law, discussed in Part II, as well as other aspects of the absent-law case studies that are introduced in Part I, can have implications for a variety of modern criminal justice debates, including those regarding the appropriate distributive principle for criminal liability and punishment, restorative justice and jury sentencing, the movement to promote non-incarcerative sanctions, transitional justice and

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[117] Price, supra note [11], at 227.

[118] Rasmussen, supra note [18], at 21; telephone interview of Anne Crawford, Dean of Akitsiraq Law School, by Sarah Robinson, October 9, 2011 (notes with author).

[119] See Weyrauch supra note [68], at 435 (reporting that people previously released from prison by Nazi regime were later re-arrested to serve sentences).

[120] Williams, supra note [9], at 344.

[121] See John M. Darley et al., Incapacitation and Just Deserts as Motives for Punishment, 24 Law and Human Behav. 659 (2000) [hereinafter *Darley et al., Incapacitation*].

[122] Id. at 671-675.

truth commissions, the use-of-force rules under international law, fairness in criminal adjudication procedures, and crime-control policy in fighting organized crime and terrorism.

A. Distributive Principle for Criminal Liability and Punishment: The Utility of Desert

In current debates about the proper principles for distributing criminal liability and punishment, one proposal urges departure from the classic distributive principles of deterrence, incapacitation, or deotological desert, in favor of tracking the shared intuitions of justice of the community it governs – what has been called "empirical desert."[123] It is argued that a criminal law whose rules predictably produce injustice or failures of justice, as perceived by the community, will inevitably lose moral credibility with that community, and thereby lose its power to gain deference and compliance and to help shape community norms. Writers have offered both support and criticism of the proposal.[124] What, if anything, does the experience of absent-law situations tell us about the current empirical-desert debate? The experiences tend to support many keys points of the proposal, but also give reasons for pause.

The absent-law case studies suggest that using empirical desert as a distributive principle for liability and punishment is not a new and revolutionary development but rather a return in a sense to the natural state in which humans first made such judgments. It seems likely that the wrongdoing and punishment rules that absent-law groups construct for themselves are primarily the product of the group's shared judgements about wrongdoing and punishment. They have little else to look to. Modern utilitarian analysis had not been invented at the time of all but the most recent case studies. And recent studies suggest that even people in modern criminal justice systems, who may seem more instrumental in their thinking than their ancestors, in fact look to their notions of desert when deciding punishment, not to other instrumentalist factors, such as those relating to deterrence or incapacitation.[125] That is, while deserved punishment typically has a deterrent and incapacitative effect, where the three goals are not consistent – that is, where following deterrence or incapacitation would cause injustice or a failure of justice, as is

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[123] See Robinson, Distributive Principles, supra note [94], at 257-260; Robinson & Darley, Implications, *supra* note [79], at 18; Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, The Disutility of Injustice, 85 NYU L. Rev. 1941, 1943 (2010); Paul H. Robinson, Empirical Desert, *in* Criminal Law Conversations, ch. 2 (Paul H. Robinson ed., 2009).

[124] See, e.g., Robinson, Criminal Law Conversations, id., at 39-61 (see comments by: Mary Sigler, Adam J. Kolber, Michael T. Cahill, Alice Ristroph, Youngjae Lee, Matthew Lister, Joseph E. Kennedy, Andrew E. Taslitz, Adil Ahmad Haque, and Laura I. Appleman); id. at 61-66 (reply by Paul H. Robinson).

[125] Darley et al., Incapacitation, supra note [79] (finding that just deserts was primary sentencing motive in two experiments looking at desert motives and incapacitation motives); Kevin M. Carlsmith et al., Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment, 86 Journal of Personality and Social Psychology 284 (2002) (finding that individual sentencing decisions are motivated by just desert factors instead of by deterrence factors); Kevin M. Carlsmith, The Roles of Retribution and Utility in Determining Punishment, 42 J. Experimental Soc. Psychol. 437 (2006).

common[126] – people's intuitions are to follow desert, to set the punishment according to the extent of the offender's perceived moral blameworthiness.[127]

The experience of absent-law cases does seem to confirm recent empirical work suggesting that one could indeed construct and operate a criminal law based upon shared intuitions of justice. That is, the absent-law actors seem to feel quite confident and comfortable in their ability to create an ad hoc criminal law and enforcement system based solely upon the notions of justice shared among the group. They commonly produce a criminal law based upon "empirical desert" without giving it much thought.

Beyond setting a precedent for empirical desert as a distributive principle, the absent-law experiences also seem supportive of the rationale behind that principle. That is, it seems to support the observation that lay people attach great importance to doing justice, even if it incurs significant personal costs. Despite difficult circumstances, the absent-law groups show a strong interest in doing justice for wrongdoing among its members, even when that justice-doing is personally costly to the members, even members not related to the offender or the victim. Recall the examples recounted in Part II.C.1, regarding the costs willingly incurred by groups as diverse as gold miners, wagon trains, prisoners at Treblinka, Warsaw underground, and the San Francisco Vigilance Committee.[128] (This does not bode well for the abolition of punishment movement.[129])

In other words, the absent-law case studies help illustrate the cental point of the "utility of desert" argument that a lack of moral credibility in the system for punishing wrongdoing can have negative consequences. The cases seem to suggest that injustices or failures of justice may prompt at best vigilantism and at worst chaos. Recall some of the examples given in Part II.C.3, such as the survivors of the *Batavia*, who were provoked to abandon Cornelisz and join together to form a more democratic group on another island; the non-mutinous members of the *Globe*, who rose to take the ship back from the mutineers; the sailors who were prompted by unjust treatment aboard privateers to join more democratic pirate crews; or the San Francisco Vigilance Committee taking over when the legal authorities became corrupt.[130]

Additional case studies offer other examples of the crime-control costs of undermining the law's moral credibility. Prohibition may be the most obvious and compelling example. The national prohibition of alcohol, which ran from 1920 to 1933, was a "noble experiment" meant to

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[126] Robinson, Distributive Principles, supra note [94], at 12-17.

[127] While the absent-law cases provide historical support for reliance upon empirical desert, there are important differences between that proposal and the absent-law experiences. Rather than ad hoc application, as the absent-law cases provide, the empirical-desert proposal would rely on empirical studies of the community's shared intuitions of justice, rather than on community adjudication of individual cases. The study results would be used to construct rules – criminal codes, sentencing guidelines, and advice statements for the exercise of judicial sentencing discretion – that would be applied the same to all defendants. In the absent-law situations, in contrast, the group directly applies its intuitions of justice to the case at hand, with the attendant dangers of bias and disparity in application among similar cases.

[128] See text accompanying notes [69, 70, 71, 72, 73] supra..

[129] See Robinson, Implications, supra note [79], at 11-18 (arguing that societies should not abolish punishment because it conflicts with inherent human instinct to punish wrongdoers, and because availability of punishment greatly reduces frequency of norm violations in society).

[130] See text accompanying notes [107, 108, 110, 103] supra.

reduce crime and corruption, solve social problems, reduce the tax burden created by prisons, and improve health and hygiene, yet it proved to be a "miserable failure on all counts. . . . Although consumption of alcohol fell at the beginning of prohibition, it subsequently increased. Alcohol became more dangerous to consume; crime increased and became 'organized'; the court and prison systems were stretched to the breaking point; and corruption of public officials was rampant."[131] In 1928, President Herbert Hoover made the issue of lawlessness central to his re-election campaign. In his inaugural speech he declared, "Our whole system of self-government will crumble either if officials elect what laws they will enforce or if citizens elect what laws they will support. The worst evil of disrespect for some law is that it destroys respect for all law."[132] The 1931 report of the National Commission on Law Observance and Enforcement (the Wickersham Commission), observed that "law will be observed and may be enforced only where and to the extent that it reflects or is an expression of the general opinion of the normally law-abiding elements of the community. . . . It is therefore a serious impairment of the legal order to have a national law on the books theoretically governing the whole land, announcing a policy for the whole land which public opinion in many important centers will not enforce."[133] The collapse of prohibition came soon after the release of the Report.

The absent-law cases also provide some help in implementing a system of empirical desert as a distributive principle, for they tell us something about the relative importance of different rules in the eyes of lay persons. This may be relevant to implementing empirical-desert because one might speculate that deviation from the most important rules, as the community sees them, is more likely to produce the alienation that would undercut deference and cooperation. In judging the relative importance of different rules, one might guess that given the difficult situations of many absent-law groups, they were most likely to turn their attention to adopting the rules that they saw as the most important; they would not waste their limited time and energy sorting out rules of only collateral importance. Thus, the rules most common among the absent-law groups may be those that a criminal law should consider as essential, and from which deviations from community views might be most costly.

The prohibitions that seem to be near the top of all the lists in our case studies – sometimes the only items on the list – are those against physical aggression and taking property from another without consent. As it happens, these are the same wrongs that are shown by empirical study to have high levels of agreement across all demographics in judging their relative blameworthiness; they have been termed the "core of wrongdoing."[134] That the groups in absent-law situations look first to these would seem consistent with those empirical studies.

What, if anything, can the absent-law cases tell us about the content of groups' punishment judgements? As already noted, the absent-law cases seem to confirm recent empirical research that people naturally look to principles of desert when imposing punishment,

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[131] Mark Thornton, Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure 1 (1991).

[132] Harry G. Levine, The Birth of American Alcohol Control: Prohibition, the Power Elite and the Problem of Lawlessness, 12 Contemp. Drug Probs. 63, 65 (1985).

[133] George W. Wickersham, National Commission on Law Observance and Enforcement Commission Report, H.R. Doc. No, 722, at 49 (1931).

[134] Robinson & Kurzban, Concordance, supra note [75], at 1832.

rather than to principles of general deterrence or incapacitation.[135] For example, the case studies provide many examples of groups that, despite their difficult circumstances, relied upon a principle of proportionality to blameworthiness in assessing punishment. Recall the examples in Part II.C.2. of such proportionality of punishments among groups among mining camps, Jamestown, pirates, and Eskimos.[136] Note that such a blameworthiness-proportionality principle commonly conflicts with the modern crime-control theories of general deterrence and incapacitation.[137]

Similarly, the case studies provide many examples of groups that recognized a wide variety of blamelessness-based defenses and mitigations. Recall the examples in Part II.C.2. of the Andes survivors giving a mistake defense to one of their group, the three pirate captains who borrowed clothing from the common loot being let off because of lack of intent, wagon train juries giving a self-defense justification, the *Globe* group recognizing a coercion excuse, and the Attica prisoner council providing an insanity defense to an inmate.[138] The recognition of these defenses and mitigations, even in the difficult circumstances of the absent-law groups, suggests that adhering to justice is sufficiently important to lay persons that deviations from empirical desert are likely to undermine the criminal law's moral credibility with them, and thus its ability to harness the powerful forces of normative influence.

On the other hand, the absent-law cases do show that groups can be deflected from their focus on desert. Recall the examples reviewed in Part II.D.1, of the Andes group forgoing punishment of the food theft to avoid group upset, the Attica prisoner council ignoring violations of the sexual-activity ban, the women on Pitcairn forgoing punishment of their abusers because it would be difficult to manage the island without them, and the Netsilik failing to punish insult killings because they could not afford losing another hunter.[139] But the cases also suggest that people revert back to their default of just deserts when the immediate danger is removed or controlled. Recall the examples in Part II.D.2: of the Maroon communities dropping the death penalty for nearly all offenses once they had made peace with the British, the Netsilik dropping their tolerance of insult killings once their living conditions had improved, the return to an intolerance of prostitution in Berlin as food became available, and the San Francisco Vigilance Committee disbanding itself .[140] Recall that both of these dynamics – the distraction from desert by a threat to personal safety, and a reversion to desert upon removal of the threat – are consistent with recent studies on lay judgments in imposing punishment.[141]

On the other hand, the absent-law case studies also illustrate some dangers in tracking community views. In the Pitcairn case, for example, the male inhabitants might well argue that their sexual abuse of the women on the island, including even the young girls, is conduct that was not socially prohibited in that isolated culture. Recall that many women in the community

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[135] See Part II. C. 2..

[136] See text accompanying notes [90, 91, 92, and 93] supra.

[137] See Robinson, Distributive Principles, supra note [94], at 12-17. Of course, it is also possible that the liability rules adopted may be distorted in some way by the difficult situations the groups commonly are in. On the other hand, we see similar patterns of liability rules across many different situations suggesting that they are a product of something else, not just the unique situation.

[138] See text accompanying notes [96, 97, 99,100, and 101] supra.

[139] See text accompanying notes [116, 118, 119, and 120] supra .

[140] See text accompanying notes [122, 123, 124, and 125] supra.

[141] See text accompanying notes [126-127] supra.

supported the men, making it difficult for the outside authorities to effectively prosecute them. In the end, the few men who were held criminally liable by the outside authorities served less than two years in prison as punishment for committing what the outside world saw as many serious offenses.[142] Thus, tracking community views, one might conclude, could produce an appalling result because community views can be seriously off track.

One might look at the Pitcairn case and conclude that the men's perverse view of the propriety of intercourse with young girls was not the community view but only the view of the males, and that the apparent community support was obtained only by social pressure. That is, one might view the Pitcairn problem not so much as an example of a perverse community view but rather as a failure of democracy – the women's views were ignored. (Note that after the spotlight of outside scrutiny, the younger women generally left the island. A recent count shows that while little girls and older adult women remain, only one woman between the ages of 11 and 31 still lives there,[143] which would seem to undercut the view that the most sexually attractive women and girls shared the view that the intercourse was an acceptable norm.) But even if Pitcairn is not in truth a case of a deviant norm being given deference, it does illustrate how such a situation could come about, which would seem to present a problem for the empirical desert proposal.

B. Restorative Justice and Jury Sentencing

The "restorative justice" movement seeks to promote alternative adjudication processes to the official criminal justice system. A variety of processes – such as victim-offender mediation, sentencing circles, or restorative conferences – seek to create a better understanding by both victim and offender of the causes and consequences of the offense, in an attempt to both heal the victim and reintegrate the offender back into law-abiding society. Most of the processes involve family and friends of both the victim and the offender, as well as community members.[144] The founders of the movement had an anti-punishment agenda, although that orientation has provoked resistance to the movement and commonly left its use limited to cases of minor offenses.[145] I and others have argued that the potential benefits of restorative processes would support the use of such processes in much more serious offenses.[146]

Do the absent-law cases have anything to say about the modern restorative justice debates? One might first observe that what is happening in most restorative justice processes, especially those processes that involve the larger groups, is the group sorting out for itself what punishment it thinks is appropriate, without legal constraint or guidance. That, of course, is exactly what absent-law groups do. Further, the makeup of most restorative-process groups is

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[142] Marks, supra note [16], at 143-155.

[143] Pacific Union College, Pitcairn Islands Study Center: Pitcairn's Population, http://library.puc.edu/pitcairn/pitcairn/population.shtml (last updated June 20, 2011).

[144] Paul H. Robinson, Restorative Processes & Doing Justice, 3 University of St. Thomas Law Review 421, 421 (2006) [hereinafter *Robinson, Restorative Processes*].

[145] Id. at 428; Paul H. Robinson, The Virtues of Restorative Processes, the Vices of Restorative Justice, 2003 Utah Law Review 375, 378-9 [hereinafter *Robinson, Virtues & Vices*].

[146] See Robinson, Restorative Processes, supra note [150], at 428; id. Virtues & Vices, at 386; Heather Strang & Lawrence W. Sherman, Repairing the Harm: Victims and Restorative Justice, 2003 Utah L. Rev. 15, 40.

not dissimilar to that of many absent-law groups. Both tend to include people who are acquainted with and involved in the lives of the offender and the victim. One might conclude, then, that what we see happening in the absent-law groups may in some way approximate what is happening in many restorative-justice processes.

The absent-law experiences would seem to support the use of restorative processes in that they seem to confirm that this sort of decision-making is something that such groups can do and feel quite comfortable in doing. Also in support of restorative processes is the fact that what is going on there is not something untried and revolutionary but rather something that is not so different from what human groups have done for thousands of generations and what groups regularly continue to do when needed.

On the other hand, some aspects of the absent-law experience may raise concerns, at least for some advocates of restorative justice – although those same aspects may resolve concerns for some of its opponents. As discussed above in the context of empirical desert, we know that laypersons, when left to their own devices, look to their notions of desert in making liability and punishment decisions (rather than to other more instrumentalist concerns such as general deterrence and incapacitation of the dangerous[147]) and care a good deal about justice being done.[148] What we have seen of groups in the absent-law situations is consistent with this tendency to look to deserved punishment.

This stands in stark contrast, of course, to what the founders of the restorative justice movement wanted. Their goal was in large part an anti-desert program. John Braithwaite, perhaps the most well-known early advocate, eventually became more explicit and public about his anti-desert agenda. "One value of restorative justice is that we should be reluctant to resort to punishment. [Restorative justice] involves rejection of a justice that balances the hurt of the crime with proportionately hurtful punishment."[149] These advocates, then, may be troubled by the tendency of absent-law groups to focus on deserved punishment, for it may suggest that restorative processes are not the path to undercutting deserved punishment that they had hoped for. On the other hand, for those who see value in giving deserved punishment,[150] whether for deontological reasons or for the crime-control utility that "empirical desert" can bring, the tendency of lay groups to look to desert may make restorative processes more attractive than its anti-desert reputation might suggest.[151] That insight may reduce resistance to such programs and help open the benefits of restorative processes to use with more serious offenses.

The examination of absent-law situations does, however, offer a ground for concern about restorative processes that many may share, no matter what their views on desert. The potential

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[147] See text accompanying notes [128-132] supra.

[148] Id.; see also text accompanying notes [75-82].

[149] John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. Rev. 1727, 1743 (1999). See Robinson & Darley, Implications, supra note [73], at 13.

[150] Both those supporting empirical desert and those supporting deontological desert who see the former as the best practical approximation of the latter. See Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, 67 Cambridge Law Journal 145 (2008) [hereinafter *Robinson, Competing Conceptions*].

[151] See Robinson, Virtues & Vices, supra note [150], at 380; Restorative Process, supra note [150], at 426-8.

for a perverted norm, as illustrated in the previous discussion of the Pitcairn case,[152] may be even more problematic for restorative justice than for empirical desert. If the members of the restorative-process group share that perverted norm, then it will get full play in the group's decisionmaking. What is worse, under a traditional legal system in which the liability and punishment rules are public and explicit, shared perverse views are more likely to be exposed, and challenged. But given the private nature of restorative-process decisionmaking and the. absence of explicit rules, a perverted norm may be well hidden. That lack of transparency reduces the chances of larger public scrutiny.

Imagine the results in the Pitcairn case if restorative processes had been used. The same social pressures that brought recantations by the complainants and community support for the offenders would likely have produced a restorative-justice result that minimized, if not trivialized, the wrongdoing, and allowed the abusers to escape all sanction. That is, the use of restorative processes in place of traditional legal liability and punishment rules may help maintain perverted norms rather than challenge them.

A second danger that restorative justice processes may share with the absent-law cases is the potential for lack of uniformity in application among different decision-making groups. While shared intuitions may bring some similarity in treatment, the absence of guidelines or of any information about what has been done in other similar cases invite disparity in application that could be avoided. Unlike the absent-law situations, this weakness can be fixed in the restorative justice context, simply by providing non-binding guidelines – reports of what was done in other, similar cases – tat the group can include in their decisionmaking.

If one wanted to keep the community views of absent-law cases but keep it within tighter control of legal guidelines, one could adopt a system of jury sentencing. (It would not, of course, have the special benefits of restorative processes that engage offenders and their victims.) That is, one can imagine a system in which community views on proper punishment were given weight, but under the guidance of a criminal justice system thought assured greater transparency and uniformity in application. Today six states use forms of jury sentencing in non-capital felony cases.[153] Following a conviction, juries choose a sentence within a prescribed statutory range.[154] Under current procedures, the sentencing discretion of juries is largely unguided; the trial judge is permitted to reduce a jury sentence but not increase it.[155]

Current jury sentencing practice does raise some concerns. Limitations on the amount and type of information made available to juries and on range of sentences from which juries can choose, in comparison to sentencing judges, limit their ability to impose a sentence that truly reflects the community's views.[156] At the same time, the inability of a jury to put the case at hand

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[152] See text accompanying note [147] supra.

[153] The six states include: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. See Nancy J. King, How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared, 2 Ohio State Journal of Criminal Justice 195, 195 (2004-5).

[154] Melissa Carrington, Applying Apprendi To Jury Sentencing: Why States Felony Jury Sentencing Threatens the Right to a Jury Trial, 2011 University of Illinois Law Review 1359, 1368 (in contrast to judges, sentencing juries are not permitted to sentence defendants to probation or to defer sentences).

[155] See King, supra note [158], at 205.

[156] See Carrington, supra note [159]; Nancy J. King & Rosevelt L. Noble, Felony Jury

(continued...)

into the wider perspective of how similar cases have bene dealt with in the past, invites unfortunate disparity in application among similar cases. Still, one can imagine a reformed system of jury sentencing that avoids these problems by providing sentencing guidelines for a full range of punishments, as are now commonly given to sentencing judges.

C. Non-Incarcerative Sanctions

The past several decades have seen a growing interest in non-incarcerative sanctions. Some writers have even advocated the abolition of prisons,[157] but more commonly there is support for using sanctions other than prison whenever possible.[158] The absent-law situations offer a perspective on the issue because, given their circumstances, prison commonly is not a punishment option. Ship or plane wreck groups have no means of jailing an offender, nor do wagon trains, gold miners, or the nomadic Eskimos. Even where groups are more settled, incarceration as a form of punishment requires a central government to administer it, which was simply not available to pirate colonies, for example. And where the absent-law groups are themselves already prisoners, they have insufficient control over their institutions to do so, as in Treblinka, the Japanese camps, or the leper colony on Molokai.

The current interest in nonincarcerative punishments derives from a variety of reasons: alternatives to prison may be cheaper, they may avoid exposing the offender to other criminals, they may provide greater possibilities for rehabilitation, they may reduce the problem of subsequent reintegration into society and prevent the problem of social displacement, and they are perceived by some as less degrading to the offender; and currently there is little evidence to suggest that the alternatives are less effective than incarceration in deterring various crimes.[159] Some people also support alternatives to incarceration because they see them as a useful path to avoid deserved punishment.[160] But given the strength of people's interest in having serious wrongdoing punished, this justification for alternatives to prison is likely to leave such alternatives limited to use in only minor offenses, as with restorative justice.

The real challenge for the movement is to broaden the use of nonincarcerative sanctions to serious offenses, but that requires developing that will have sufficient punitive bite to serve as

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[156] (...continued)
Sentencing in Practice: A Three-State Study, 57(3) Vand. L. Rev. 885 (2004).

[157] Angela Y. Davis & Dylan Rodriguez, The Challenge of Prison Abolition: A Conversation 27 Social Justice 212 (2000).

[158] See Developments in the Law: Alternatives to Incarceration, 111 Harvard Law Review 1863 (1998); Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591 (1996); Marsha Weissman, Aspiring To the Impracticable: Alternatives To Incarceration In the Era of Mass Incarceration, 33 N.Y.U. Rev. L. & Soc. Change 235, 237-47 (2009).

[159] Id. Kahan, at 592; Developments in the Law: Alternatives to Incarceration, supra note [163], at 1969-1974 (1996).

[160] John Braithwaite & Philip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice 6-7 (1993); James Gilligan & Bandy Lee, Beyond the Prison Paradigm: From Provoking Violence to Preventing It by Creating "Anti-Prisons," Annals of the New York Academy of Sciences, 1036 Youth Violence: Scientific Approaches to Prevention 300 (2004); John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. Rev. 1727 (1999); Mirko Bagaric & Kumar Amarasekara, The Errors of Retributivism, 24 Melb. U. L. Rev. 124 (2000).

an adequate prison substitute. The layperson's demand for justice ought not be taken to discourage the movement. One of the more obvious conclusions that one can draw from the absent-law experience is that a group can what is seen as a morally credible system for responding to serious wrongdoing without the use of prison. Whatever level of punishment is required, the cases show that it can be provided through non-incarcerative means. One would need to take account of the different levels of punitiveness inherent in different punishment methods,[161] of course, but once this factoring had been done, there seems little reason that one could not provide the full deserved-punishment amount by using a non-incarcerative or combination of non-incarcerative sanctions.[162]

If the proponents of alternative sanctions have a difficulty, it is that a sanction with sufficient punitive bite to substitute for prison may be unattractive or unavailable in a modern American criminal justice system. There are serious constitutional limits to the use of non-incarcerative forms of punishment, even when used with the agreement of the offender as a means of avoiding or reducing prison time.[163] Voluntary castration, for example, has been held unconstitutional by some courts, even when offered as an alternative to incarceration at the defendant's option.[164]

The practices in the absent-law cases illustrate the problem. Many if not most of the wide range of non-incarcerative sanctions would not work for us, such as whipping, branding, beating, mutilating (such as "ear cropping" in the mining camps and "splitting the nose and ears" among pirates), denying food, keeping in painful chains, or punishing relatives.[165] Even if an offender elected any of these punishments in lieu of prison, we presumably would not permit their use. They probably violate prohibitions on punishment in existing constitutional law or perhaps even in international law. The Eighth Amendment's Cruel and Unusual Punishment provision prohibits the use of forms of punishment that are beyond civilized standards and the evolving

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[161] See Paul H. Robinson, Desert, Crime Control, Disparity, and Units of Punishment, *in* Penal Theory and Practice: Tradition and Innovation in Criminal Justice 93, 101-4 (Antony Duff et al. eds., 1994) [hereinafter: *Robinson. Units of Punishment*]; Robinson, Competing Conceptions, supra note 147, at 150-2.

[162] Robinson, Units of Punishment, id. at 98.

[163] See, e.g., People v. Darlene Johnson, No. 29390 (Jan. 2, 1991) (forced implanted contraception as a condition of probation - appeal withdrawn); State v. Oakley, 629 N.W.2d 200 (Wis. 2001) (prohibition from fathering/bearing child during a probation period - cert. denied); State v. Kline, 963 P.2d 697 (Or. Ct. App. 1998) (upheld on appeal); State v. Livingston, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (appeal court invalidated condition that defendant not have another child for five years in child abuse case) ; Krebs v. Wisconsin, 568 N.W.2d 26 (Wis. Ct. App. 1997) (prohibition from engaging in sexual intercourse with any women without obtaining permission from parole officer - upheld on appeal); People v. Murillo, 171 Cal. App. 4th 210 (Cal. App. 6th Dist. 2009) (mandatory consumption of prescribed medications as probation condition - condition overturned on appeal for being too broad). For analysis, see Michael P. Matthews, Caning And The Constitution: Why the Backlash Against Crime Won't Result In the Back-Lashing of Criminals, 14 N.Y.L. Sch. J. Hum. Rts. 571 (1998).

[164] See, e.g., State v. Brown, 326 S.E.2d 410 (S.C. 1985).

[165] Angus Konstam, The History of Pirates 186 (2002); Price, supra note [14], at 108; Marks, supra note [16], at 42; John Boessenecker, Gold Dust and Gunsmoke: Tales of Gold Rush: Outlaws, Gunfighters, Lawmen, and Vigilantes 30-31, 51 (1999) (flogging, branding, and ear cropping).

standards of decency.[166] Under the provision, non-incarcerative sanctions such as hard labor,[167] pillory,[168] and revocation of citizenship[169] have been found unconstitutional.[170]

Might there be other non-incarcerative sanctions used by absent-law groups that might provide realistic alternatives in modern America? Some absent-law cases use alternatives that are already common in the United States, such as fines, manual labor, and death. But at least two other kinds of sanctions are not so common in current practice and might not be prohibited (or might) by our legal and moral limitations on punishment method: banishment and various forms of shaming.

We see several forms of banishment in the absent-law cases. In the mining camps, offenders were often ejected from the camp as their formal punishment. When the San Francisco Vigilance Committee was in control of the city, they would send letters to people who they concluded were criminals, telling them to leave the city. The wagon trains ejected members for some types of misbehavior. Some pirate groups adopted rules that specified various forms of abandonment.[171]

No doubt there would need to be limitations on a modern form of banishment, although it is not entirely clear what they might be. Both interstate and intrastate forms of banishment are practiced in several states,[172] however, the latter is more commonly applied and some states explicitly prohibit the former.[173] A few states theoretically ban the use of banishment, but permit incorporation of sentence conditions that essentially achieve the same purpose, and exclude an individual from a defined geographical location.[174] Banishment sentences have been challenged

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[166] See Jeffery L. Kirchmeier, Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment, 32 Conn. L. Rev. 615, 619-30 (2000).

[167] Weems v. United States, 217 U.S. 349 (1910).

[168] Id. at 377-78.

[169] Tropp v. Dulles, 356 U.S. 86 (1958).

[170] These same constitutional limitations put constrain on the conditions under which the state may confine persons convicted of crimes. "Prison authorities may not withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanitation, and necessary medical attention." The proscription also prohibits excessive use of force by prison officers and unnecessary and wanton infliction of pain, even if the use of force does not cause a serious injury. Some inference can be made from this body of case law to the constitutional permissibility of non-incarcerative sanctions. See 60 Am. Jur. 2d Penal and Correctional Etc. § 24. Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981); Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978); Graves v. Texas Dept. of Corrections Employees, 827 S.W.2d 47 (Tex. App. Houston 1st Dist. 1992); Newman v. State of Ala., 559 F.2d 283 (5th Cir. 1977).

[171] Shinn, supra note [9], at 172 (gold miners); Williams, supra note [9], at 234 (vigilantes); Charles Fayette McGlashan, History of the Donner Party: A Tragedy of the Sierra 49 (1907) (wagon trains); Leeson, Invisible Hook, supra note [103], at 61 (pirates).

[172] For example Georgia, Mississippi, Florida, Wisconsin, and Oregon, see Matthew D. Borrelli, Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment, 36 Suffolk U. L. Rev. 469, 473-4 (2003).

[173] For example Georgia, Wisconsin and Mississippi. See Matthew D. Borrelli, Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment, 36 Suffolk U. L. Rev. 469, 473 (2003).

[174] See North Carolina (State v. Culp, 226 S.E.2d 841, 842 (N.C. Ct. App. 1976)) and Minnesota

(continued...)

on constitutional as well as public policy grounds, and upheld by some courts,[175] but banned by others.[176] The issue has not yet been reviewed by the Supreme Court.

As a thought exercise, one might imagine a program in which a non-dangerous offender is set up in a remote small town, but one large enough to have a sheriff. Obviously this could not be done without the consent of the town officials, but such consent might be easily induced with a municipal grant of an amount less than the cost of the offender's imprisonment. $20,000 a year might be a significant windfall for a remote small town. The offender would be obliged to support himself, as everyone else in town does, although one would not start such a placement without some initial employment arranged. Not much happens in a small town that people don't know about, and this variation on "it takes a village to raise a child" might, through the natural dynamics that arise when people live together, provide the offender with useful supervision and guidance. As the absent-law cases illustrate, when remote groups have to live together, they tend to develop means by which they can all get along.

Related to banishment is shunning – a kind of "banishment in place" – where members of the group simply will not converse with or deal with the offender. This can be an attractive option for an absent-law group because it may allow the group to still get the benefit of the offender's labor, while nonetheless imposing some kind of punishment for his violation. Shunning was used in the Maroons and in Anguilla.[177] Shunning also has a shaming quality to it, which is a form of punishment made more explicit in some sanctions.

The absent-law cases show the use of a variety of shaming penalties. In the Japanese-run prison camps, for example, the prisoners used shame to sanction fellow prisoners. When a cook stole a man's shoes, he was required by the group to wear a sign around his neck that read “I AM A THIEF.” Among the Netsilik Inuk, derision and shame are common forms of correction. In one form – formalized song duels (perhaps the first rap contests?) – two men compose and perform insulting songs about one another. Sung at public gatherings, the group expresses their views on the relative truth of the various insults through their laughs and jeers. In Somalia, the tribal group might let a car thief off with a sentence of simply having to return the vehicle, but

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[174] (...continued)
(State v. Franklin, 604 N.W.2d 79, 84 (Minn. 2000)).

[175] Edwards v. State, 327 S.E.2d 559, 561 (Ga. Ct. App. 1985) (holding banishment as valid condition of probation); State v. Jacobs, 692 P.2d 1387, 1389 (Or. Ct. App. 1984) (acknowledging use of banishment for probation); State v. Collett, 208 S.E.2d 472, 473 (Ga. 1974) (holding banishment permissive in Georgia) (see also: Adams v. State, 527 S.E.2d 911, 912 (Ga. 2000); Parkenson v. State, 274 S.E.2d 799, 800 (Ga. 1999)); State v. Nienhardt, 537 N.W.2d 123, 125 (Wis. Ct. App. 1995) (holding banishment permissive in Wisconsin); Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) (holding freedom of movement does not apply to intrastate banishment).

[176] Henry v. State, 280 S.E.2d 536, 536-37 (S.C. 1981) (reversing banishment on constitutional violation); Commonwealth v. Pike, 701 N.E.2d 951, 960 (Mass. 1998) (interstate banishment as violation of freedom of travel); People v. Baum, 231 N.W. 95, 96 (Mich. 1930) (pushing criminals into other states does not comport with public policy, and violates constitutional principles. Banishment creates a large burden on states' societal and economic areas and impacts the relationships between states that support banishment and the ones that do not).

[177] The people of Anguilla found that to voice opinions other than those of the majority quickly lead to ostracism. Colville Petty & Nat Hodges, 25th Anniversary of the Anguillian Revolution 1967-1992 17-19 (1992). (It also was used on Pitcairn – against the victims of child abuse because of their original decision to participate in the abuse prosecutions. Marks, supra note [16], at 269.)

with all parties understanding that the real punishment would be the shame of the "conviction," which would change the man's life by leaving him branded as untrustworthy by others in his tribal group.[178] Some forms of shaming went beyond what we would find acceptable today. For example, the pirates used shame of a sort through their scarring punishments, such as splitting a man's ears and nose to leave scars that advertised him to be a thief. And gold miners and vigilance committees used a similar approach, branding a man on his face, often with a "T" for thief or with an "HT" for horse thief.[179]

Such use of shaming is all the more impressive because it is used in difficult circumstances where the group cannot afford the luxury of a punishment that does not work. That is, use in the absent-law situations suggests that shaming penalties really can be forms of punishment with significant punitive bite, and thus might well provide an adequate substitute for incarceration even in cases of serious offenses. Some modern writers have come to a similar conclusion about the effectiveness of shaming, adding, for example that the "degradation ritual" embedded in shaming sanctions creates deep discomfort and unpleasantness for most people, and the offender is likely to be as "shunned in the marketplace as they are in the public square," leading to possible financial consequences.[180] For some offenders and some offenses, public shaming may well have a very high punitive bite.

Shaming is also supported because it is said to shape social preferences by unambiguously marking "the offender's behavior as contrary to community moral norms." They send "a clear signal about the types of preferences well formed persons should and shouldn't have."[181] It is, they argue, a social expression of condemnation,[182] and its flexible implementation enables its adaptation to the specific circumstances of the offender.[183] It provides the means to express, reinforce, and shape social norms.[184] They argue that, in comparison to incarceration, "shaming an offender was less cruel, less publicly degrading, and less likely to interfere with an offender's future prospects"[185] It can provide a cost effective alternative to mass incarceration, while producing a "roughly equivalent punitive force."[186]

On the other hand, opponents of shaming sanctions often view them as inordinately cruel, inhumane, and demeaning to the offender,[187] since they frequently involve a loss of respect that

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[178] Knox, supra note [47], at 150; Geert Van Den Steenhoven, Legal Concepts Among the Netsilik Eskimos of Pelly Bay 36 (1959); Konstam, supra note [170], at 186; Louisa Lombard, Elder Counsel: How Somalia's Aged Tribal Justice System Keeps the Peace in a Country Known for Chaos http://www.legalaffairs.org/issues/September-October-2005/scene_lombard_sepoct05.msp (last accessed on January 10, 2012).

[179] Boessenecker, supra note [170] at 30-31.

[180] See Kahan, supra note [163], at 638.

[181] Id. at 639.

[182] See Kahan, supra note [163], at 630-52.

[183] Comment, Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law, 116 Harvard Law Review 2186, 2189 (2003) [hereinafter *Shame, Stigma and Crime*].

[184] Id. at 635-6.

[185] See Kahan, supra note [163], at 646.

[186] Norval Morris & Michael Tonry, Between Prison and Probation: Intermediate Punishments In A Rational Sentencing System 90 (1990).

[187] Toni M. Massaro, Shame, Culture and American Criminal Law, 89 Mich. L. Rev. 1880,

(continued...)

can lead to a "crippling diminishment of self-esteem" and "serious financial hardship."[188] Further, some hypothesize a detrimental effect on an offender as it encourages him to view himself as an outcast, which can push him to associate with marginal deviant social groups, leading to continuing criminal involvement.[189] Finally, proponents note the chance of incidences of vigilantism against shamed defendants, which they believe promote a spirit of public indecency and brutality.[190] Of course, a response to some of these criticisms may be that, while shaming penalties may have some problems, those problems are less than for the incarceration that they would replace.

As to the effectiveness of shaming penalties, while the absent-law experience suggests that they can be quite effective, there may be reasons to wonder whether that effectiveness would survive their transplantation to modern America. Shaming can provide punitive bite only if the offender values the respect of those who would see the public pronouncement as something shameful. Such is commonly the case in the absent-law situations, but might not be the case in modern American, where there is often a high degree of anonymity and a lack of social interdependency.[191] This is especially the case where the people whose views the offender cares about reject the norm at issue, as perhaps with gang members, for example. Nor is an attempt at shaming likely to have much effect when used for an offense for which there is only mixed support of the underlying norm, as perhaps with some drug offenses. Given that in the federal system, in particular, a high proportion of the prison population is incarcerated for drug offenses,[192] shaming penalties as an alternative to incarceration may not be feasible. Ironically, then, the less the support for the underlying norm, the more difficult it is to use shaming penalties as an effective alternative for prison. Further, the more anonymous an offender, the less an offender may care what others think of him.

On the other hand, the more people get used to anonymity, the more jolting it may be to be the center of attention for one's bad deeds. Moreover, the past decade has marked the re-emergence of social status as a high-stakes asset, due to the proliferation of civic and professional communities and technological advancements that enhance the dissemination of social information.[193] A modern example of the effect of shaming punishments can be found in cases in which offenders risk long prison terms in order to avoid being listed on a public sexual

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[187] (...continued)
1942-43 (1991),

[188] See Kahan, supra note [163], at 638.

[189] John Braithwaite, Crime, Shame And Reintegration 67 (1989).

[190] Dan Markel, Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice, 85 Tex. L. Rev. 1385, 1390 (2006-2007); James Q. Whitman, What Is Wrong with Inflicting Shame Sanctions?, 107 The Yale Law Journal 1055, 1059 (1998).

[191] See Massaro, supra note [192], at 1904-16; Shame, Stigma, and Crime supra note [188], at 2189.

[192] Federal Bureau of Prisons, Quick Facts About the Bureau of Prisons, http://www.bop.gov/news/quick.jsp#4 (last Updated 29 2011). As for October 29, 2011 inmates convicted of drug offences accounted for 50.1% of the federal prison system population.

[193] Compare John Braithwaite, Crime, Shame and Reintegration 58-59 (Cambridge 1989). See Kahan, supra note [163], at 642.

offender registry.[194] In an Arizona case, for example, a defendant rejected a plea agreement that limited his prison sentence to three and a half years, thereby risking a twenty-eight year sentence after trial, when he learned that the plea agreement would have him listed on the public registry.[195] In another case, a defendant accused of sexual offences initially agreed to plead guilty to reduced charges, but withdrew and proceeded to trial after learning of the registration requirement.[196]

No doubt there will remain reservations about the use of shaming penalties. On the issue of efficacy, however, the absent-law cases suggest that there is good reason to believe that they can be an effective penalty with serious punitive bite in specific situations. Whether the costs and risks of shaming should be tolerated may depend upon how they compare to the costs and risks of incarceration.

D. Transitional Justice and Truth Commissions

Transitional justice commonly refers to the variety of mechanisms by which a country with a history of civil conflict – perhaps a dictatorship that has abused its citizens, a civil war, or ethnic or religious conflict – deals with past wrongdoing in an attempt to transition to a stable post-conflict society, commonly democratic. Typically this involves an agreement to do less than justice would require in punishing offenders in order to put the conflict behind it. For example, a society might adopt a policy that gives amnesty to past offenders in return for giving public statements to "truth commissions." The most well-known example of this may be the Truth and Reconciliation Commission established in post-apartheid South Africa in 1995.[197] People who work in the field give it an earlier starting date.

> The origins of the transitional justice field can be traced back to the post-World War II period in Europe with the establishment of the International Military Tribunal at Nuremberg and various de-Nazification programs in Germany and the trials of Japanese soldiers. . . . The field gained momentum and coherence during the 1980s and onwards, beginning with the trials of former members of the military juntas in Greece (1975) and Argentina (1983).[198]

Absent-law situations naturally tend to create transitional justice issues. The difficult circumstances commonly produce strong personal motivations for opportunistic wrongdoing, and many such situations eventually transition into an law-ordered society. Sometimes the end of the absent-law situation is simply a return to a previously-existing society, as with rescues after

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[194] Policymakers have expressed concern about this tendency of sex offenders to reject plea agreements to avoid the registration requirement. Doron Teichman, Sex, Shame, and the Law: An Economic Perspective on Megan's Laws, 42 Harv. J. on Legis. 355, 392 (2005).

[195] Id. at 392.

[196] Id.

[197] The Truth and Reconciliation Commission of South Africa Report (1998), *available at:* http://www.justice.gov.za/trc/report/index.htm

[198] Transitional Justice, Wikipedia, http://en.wikipedia.org/wiki/Transitional_justice (last visited Dec. 26, 2011); see also Ruti G. Teitel, Transitional Justice Genealogy, 16 Harvard Human Rights Journal 69, 70-72 (2003).

wrecks, in which the society's existing rules govern what is to be done about past wrongdoing. Sometimes the absent-law groups themselves create or help create the post-lawless society. The wagon trains that settled in Oregon formed a government of their own until the region became a territory and then a state. The gold eventually ran out in California but many miners stayed on and were an important voice in the territory and eventually in the formation of California as a state. The pirates who accepted the king's pardon often began new lives in the Bahamas,[199] where, as people of wealth, they had influence in the new societies being created. The Netsilik people and other Inuik of Canada now have their own territory, Nunavut, where the law of Canada and their traditional law are woven together.[200]

When the absent-law situation passes, what, if anything, is to be done to punish past wrongdoing that had gone unpunished because of the limitations inherent in the absent-law situation? Often a "transitional justice" approach is taken, in which past misdeeds are to be ignored and the focus is to be upon a stable and peaceful future. The experiences of the absent-law cases offer both support and warnings to the practice of transitional justice, especially where, as with the use of truth commissions, past serious wrongdoing is rather clearly not punished.

The warning for transitional justice comes from the demonstration in many cases that doing justice is important to people, even people in difficult circumstances for whom doing justice has a direct personal cost. Recall from Part II.C.1 the absent-law operation of the justice principle: the miners of California gave up precious mining time to conduct criminal trials, as did the pioneers of the wagon trains; Nazi prisoners gave up precious sleep to capture bread thieves in the barracks; the Warsaw ghetto underground used precious ammunition and exposed themselves to personal risk to kill collaborators; the San Francisco Vigilance Committee risked prosecution and assault to try to bring order where a corrupt government had failed.[201] Similarly, recall the examples in Part II.D.2 in which an absent-law society reverted to doing justice as soon as it could afford to do so.

It would be nice to think that all can be forgiven and a society can move ahead to a blissful future, but that belief can sometimes be mere wishful thinking. Not doing justice can be a festering sore that poisons any chance of a stable future. And the loss of moral credibility in a system that appears to condone such past failures of justice can make it more difficult for that system to earn the moral authority that will be needed to bring peace and stability. Recall from Part II.C.3 the examples of the need of moral credibility if a group is to have stable social cooperation: the *Batavia* crew defected from Cornelisz, even though he had the resources, to join the other, weaker but more just group; on the *Globe*, the non-mutineers complied with orders only until they had a chance to escape; and the pirate crews were prompted to abandon the life aboard legal but abusive privateers to join illegal but more democratic pirate ships.[202]

On the other hand, the absent-law experiences do in some ways lend support to the use of transitional justice. First, it shows that transitional justice is not a modern invention of untested value. We think of the practice as post-World War II, but the absent-law cases remind us that it is an ancient practice. The pirates were given a pardon in 1717 in order to integrate them back

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[199] For a discussion of the pirates transition process, see Woodard, supra note [13], at 226-266.

[200] Telephone interview with Anne Crawford, Dean of Akitsiraq Law School, by Sarah Robinson, October 9, 2011 (notes with author).

[201] See accompanying text notes [69, 70, 71, 73 and 74] supra.

[202] See accompanying text notes [107, 108, and 110] supra.

into lawful society.[203] The Maroons too were pardoned for their past warring against the British in exchange for an agreement to cease those activities.[204] In Pakistan, where corruption amongst the police was a major obstacle to effective crime control, a reform program held a ceremony for a hundred admittedly corrupt police officers who swore to never take bribes again.[205] In the 1990s, post-Escobar Colombia ignored the deeds of both the officials whose corruption allowed Pablo Escobar to come to power and the members of Los Pepes whose terroristic means helped bring him down.[206] There are many other examples of such pragmatic pardons throughout history, of course, in other than absent-law situations.[207]

Indeed, the dynamic during the absent-law situations also shows the common reliance upon the basic trade-off at the root of transitional justice: absent-law groups sometimes ignored violations of their own rules in order to preserve the stability of the group. Recall from Part II.D.1 the Andes wreck group ignoring the food theft during the preparation of body strips for eating, the Attica prisoner council ignoring the violations of their rules against attacking hostages or having sex, the Pitcairn Island women opposing the prosecution of their abusers, the Netsilik ignoring insult killings, and Prohibition agents' unwillingness to publicly expose powerful persons who continued to drink, such as the President.[208] This trading of justice for stability is not a novel practice but rather likely an integral part of the story of human group survival since the Serengeti Plain.

On the other hand, as noted above, such compromises of justice have their costs to the system's credibility. As common as the practice was in absent-law situations to ignore wrongdoing, it was equally common that absent-law groups reverted to systems that punished wrongdoing when the group's conditions improved to the point where they could afford to do so. Recall from Part II.D.2, as life in the Maroon communities became easier, they gave up execution as the main form of sanction; when the Netsilik stepped back from the brink of starvation, they no longer tolerated insult killings; when food markets reappeared in Soviet-occupied Berlin, prostitution was no longer accepted by the community (or by families); and when the San Francisco authorities became more able and willing to control crime, the Vigilance Committee disbanded itself; .[209]

In other words, failures of justice were not comfortably accepted but only unhappily tolerated, often only grudgingly and temporarily. And one does not build a stable society by accumulating grudges to be satisfied in the future. The lesson for proponents of transitional justice is to gauge the situation carefully. Failures of justice might be acceptable by one

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[203] Leeson, Invisible Hook supra note [103], at 146.

[204] Campbell, supra note [14], at 115.

[205] World Defense Network: Pakistan Defense, http://www.defence.pk/forums/current-events-social-issues/67851-gujranwala-model-punjab-police.html (last accessed on January 11, 2012).

[206] Godson, supra note [103], at 71.

[207] For example, at the end of the American Civil War, Lincoln and his successor, Andrew Johnson, issued a series of presidential pardons to help the country move past the war and toward reconciliation and reunification. Bill Long, Presidential Pardons I (1863-1868), September, 2007, http://www.drbilllong.com/LegalEssays/Pardons.html (last accessed on January 16, 2012).

[208] See text accompanying notes [116, 117, 119, 120, and 121] supra.

[209] See text accompanying notes [122, 123, 124, and 125] supra.

community as a necessary price for "moving on" to a more stable and peaceful society, but such failures might not be acceptable to another community even in at apparently similar situation.

The potential for pushing a bad fit is significant. It is often the existing regime that uses its present control of the organs of power as leverage to getting themselves immunity from prosecution for their past misdeeds through some amnesty scheme. But even when the transition is not dictated by the outgoing regime, as a condition to leaving, but rather organized by outsiders, as is commonly the case,[210] there exists the danger that the resolution of the situation may be biased by the third party's preferences – for forgiveness or for doing justice. But the goal of future stability requires that it be guided instead by the preferences of those who are to live in that future society, however unattractive those preferences may seem to outsiders. Only the future society's members can judge whether past wrongs can be let go, or whether they will instead produce a festering discontent that will undermine the system's credibility and increase the likelihood of future conflict.

E. Use-of-Force Rules Under International Law

The international law of today exists in what is essentially an absent-enforcement situation. The current state of international legal institutions leaves states with essentially no effective protection: There is no international police force for victims to call when another state unlawfully aggresses. The United Nations Security Council can authorize the use of force to maintain international peace and security, but authorization of such a "police action" can be blocked by any one of the Security Council's five permanent members or by seven of its ten elected members, and member states can refuse to provide military or financial support for an authorized action. Moreover, the process of obtaining such a resolution is both burdensome and time consuming. The net effect is that in the 67 years since the creation of the United Nations in 1945, such resolutions have been passed with respect to only two state-to-state conflicts,[211] which is a trivial fraction of the situations in which states have suffered unlawful aggression of one kind or another.[212]

As Adil Haque and I have argued elsewhere,[213] the absence of an effective enforcement mechanism has important implications for the formulation of international law's use-of-force

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[210] Eric A. Posner & Adrian Vermeule, Transitional Justice As Ordinary Justice, 117 Harv. L. Rev. 762, 769-70 (2003-4).

[211] See S.C. Res. 82, U.N. Doc. S/1501 (June 25, 1950), S.C. Res. 83, U.N. Doc. S/1511 (June 27,1950), & S.C. Res. 84, U.N. Doc. S/1588 (July 7, 1950) (authorizing use of force to compel North Korean withdrawal from South Korea); S.C. Res. 678, U.N. Doc. S/RES/0678 (Nov. 29, 1990) (authorizing use of force to compel Iraqi withdrawal from Kuwait). See also S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3,1992) (authorizing use of force to stem civil war in Somalia); S.C. Res. 1244, U.N. Doc. S/RES 1244 (June 10, 1999) (authorizing use of force to protect former Yugoslav province of Kosovo).

[212] A partial list of state-to-state invasions (64) since the signing of the U.N. Charter is available at http://en.wikipedia.org/wiki/List_of_invasions, and, of course, unlawful aggression can take many forms short of invasion.

[213] Paul H. Robinson & Adil Ahmad Haque, Advantaging Aggressors: Justice & Deterrence in International Law, Harvard National Security Journal [sec. V.A] (forthcoming 2012) [hereinafter *Robinson & Haque, Advantaging Aggressors*].

rules. Current law's limitations on the use of force to defend against unlawful aggression improperly advantage unlawful aggressors and disadvantages their victims. For example, current law bars the use of force that is necessary to defend against illegal conduct short of an "armed attack," bars the use of force against unlawful aggressors using another state as a base of operations, and bars the use of force that is necessary to defend against an imminent attack that has not yet begun, even where delay makes effective defense impossible.[214] It also bars the use of force against states who support the unlawful aggression of armed groups, even if that is the only way the armed aggression can be stopped, bars the use of force against unlawful armed attackers during the period of time between their unlawful attacks, and bars the use of force against facilities that the unlawful attackers use, even if it is the only way to prevent the attacks.[215]

No domestic criminal law system would tolerate the use of such rules. And the unjustness of the rules is something that international law should care about. Given the lack of an effective international law enforcement mechanism, compliance depends in large measure on the moral authority with which international law speaks. Compliance is less likely when its rules are perceived as obviously unjust. As discussed in Part III.A, this commonsense perspective is supported by social science research showing the importance of law's moral credibility in gaining assistance and deference, in reducing resistance and subversion, and in helping to shape shared norms. The current practice, in which victim states routinely ignore the legal limitations, with studied indifference by the international community to such "violations," only legitimizes and habituates law-breaking, further undermining international law's moral credibility.[216]

International law limitations on responses to aggression are also improper for reasons beyond their conflict with principles of justice instantiated in most countries' domestic criminal law. Most fundamentally, because international law lacks an effective law enforcement system, to effectively deter unlawful aggression, international law needs to have fewer limitations than criminal law on responses to unlawful aggression, not more limitations. The current improper limitations have the unfortunate effect of promoting aggression and instability by undermining effective deterrence.[217]

The international law approach seems similar in theory to the rationale underlying transitional justice: we should sacrifice justice (disallowing victim states from properly defending themselves against unlawful aggression) in order to promote peace and stability (which arguably will follow because, if victims do not use force, then there will be no escalation). The problem with the approach is similar to the problem with transitional justice, and worse, and the lessons from absent-law situations are similar.

Whether a trade-off of justice-for-peace would be desirable and effective in the transitional justice context depends upon the complexities of the situation at hand and the feelings of the parties in conflict. The failures of justice called for by a transitional justice "truth commission," for example, might bring peace, or might simply assure continuing acrimony, festering until it boils into violence. Each case must be judge separately. But the international

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[214] Id. at [sec. II].
[215] Id. at [sec. VI].
[216] Id. at [sec. I-IV].
[217] Id. at [sec. V-VII].

law use-of-force rules apply the same in all situations, no matter the context or the feelings of the groups. They simply give a permanent public advantage to unlawful aggressors.[218]

Further, the international law limitations on defensive force are worse than the transitional justice failures of justice because the international law rules can show neither a compelling need for, nor a significant payoff from, the failures. In the transitional justice situations, the peace-for-justice trade-off sometimes may well be the only way to move ahead. It is a one-time price that must be paid, and all parties may well see the need for it and accept it as a necessary price. But the international law rules do not provide a one-time failure but rather a permanent, continuing failure. And it is rarely clear that such rules are necessary to avoid a greater harm. A victim state can always chose not to respond to unlawful aggression if they see such restraint as being in their long-term interest. But the current rules take that decision out of the victim's hands. Nor is it clear that the current rules avoid a greater harm. Sometimes using defensive force – or at least having the legal option to use it – will more effectively avoid greater harm and better advance peace and stability than not using force. Having just rules for resisting unlawful aggression may help avoid the aggression in the first place; unjust limitations on the right to resist may help encourage it.[219]

Still further, recall the system-credibility problem in transitional justice. If the failures of justice undermine the moral credibility of the system, the system is weakened in its ability to gain the deference needed to bring the conflicting parties together. The international law context shows a similar problem. Without an effective enforcement system, international law must rely on its moral authority to gain compliance, but it is exactly that moral authority that is eroded when international law sets limits on defensive force rules that are so obviously unfair to victims.[220]

We know from the absent-law case studies that, with no law enforcement mechanism, the strong can abuse the weak. The experience of the *Invercauld* and of the Cornelisz group from the *Batavia* illustrate the point horribly. However, the cooperation principle discussed in Part II.A.1 shows how social forces among a group can step in and keep the strong in check.[221] But the moral authority that can promote such cooperation can be lost if the rules imposed are viewed by the group as unjust. This was the point documented in Part II.C.3's discussion of the justice

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[218] Id. at [sec. II].

[219] Robinson & Haque, Advantaging Aggressors, supra note [218], at [sec. III].

[220] Id. at [sec. III].

[221] Recall the Andes plane crash survivors caring for the injured and weak, the Anguillans who remained crime free even after all enforcement authorities withdrew from the island (Read,), the California mining camps where miners could leave their goods sitting out while off mining , (Shinn), and crowded uncomfortable bunkers of the Warsaw ghetto where the inmates suffered together supporting one another (Gutman). See text accompanying notes [35 (Andes), 41 (Anguilla), 37 (gold mines), and 42 (Warsaw)] supra.

An example of this phenomenon was seen in the Detroit riots of 1971. Neighborhood social groups that had previously put on teas and block parties, re-organized into armed neighborhood watch groups to keep rioters out of their neighborhood. On the island of Molokai, the exiles were all sick and without power when seen as individuals. On several occasions, the lepers formed into far more threatening mobs to get the attention of supervisors who withheld food or failed to meet the needs of the group. After the wreck of the Grafton, the weakest man Raynal, was the strongest force behind the social cooperation which saved them all.

principle.[222] In the international context, an international law that gains moral credibility by earning a reputation for being just can have normative influence. An international law perceived as unjust can only lose moral credibility, and normative influence along with it. Peace and social order require either an effective enforcement power or strong social influence. International law's lack of an effective enforcement mechanism means that it, more than domestic criminal justice systems, must work to gain moral credibility if it is to have influence.

F. Criminal Adjudication Procedures: The Practical Value of Legitimacy

Section A notes the practical value that flows from a criminal law's moral credibility derived from earning a reputation for imposing liability and punishment results perceived as just. There is a growing literature that suggests a practical value to a criminal adjudication system that earns a reputation for fair procedures.[223] Specifically, perceptions of procedural fairness – resulting in perceptions of the system's "legitimacy," as the literature terms it – may promote systemic compliance with substantive law, cooperation with legal institutions and actors, and deference to even unfavorable outcomes. (The power of a system's "legitimacy," as derived from its reputation for procedural fairness, and its "moral credibility," as derived from its reputation

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[222] Recall that in both the wreck of the *Batavia*, Dash, supra note [8], and the mutiny of the *Globe* (Comstock, supra note [11]), the leaders were only able to maintain control through threat. San Francisco's vigilantes only arose because the legal authorities would not act, supra note [9]. On Pitcairn, the men were unable to cooperate and in the end only one man was left alive, Marks supra note [16]. While the democratically-run pirate ships found willing recruits when they boarded merchant and naval ships where the men were treated unjustly, (Leeson, Invisible Hook, supra note [103]). See text accompanying note [103-110] supra.

Raynal, seemed to understand this and when descent began to grow between the captain and his former crew, Raynal purposed a system of laws and sharing of responsibilities. To emphasize the equity of the plan, Raynal placed himself first in line for the new duties. Raynal, supra note [7]. In San Francisco, when there was no government the situation was better than a few months later when an unjust government had come into power. When the citizens of the city realized that the judges were letting criminals go free in exchange for bribes, they acted by forming a strong vigilance committee. Williams, supra note [9].

[223] Tom R. Tyler & Yuen J. Huo, Trust in the Law xiv (2002); Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283, 286 (2003) [hereinafter *Tyler, Effective Rule of Law*]; Tom R. Tyler, Why People Obey the Law (2006); Tom R. Tyler, Legitimacy and Legitimation, 57 Ann. Rev. Psych. 375-400 (2006) (reviewing literature on legitimacy); Tom R. Tyler & John M. Darley, Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law, 28 Hofstra L. Rev. 707, 709, 723 (1999-2000) [hereinafter *Tyler & Darley, Morality and Legitimacy*]; Jason Sunshine & Tom R. Tyler, The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing, 37 L. & Soc'y Rev. 555-589 (2003); Tom R. Tyler & Jeffrey Fagan, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?, 6 Ohio St. J. of Crim. L. 231–75 (2008); Casper, Tyler, & Fisher, Procedural Justice in Felony Cases at 486; John W. Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975).

for producing just results, are distinct dynamics, but they are probably related and may be overlapping.[224])

Two questions are central to the legitimacy debate. First, does the perception of greater fairness in the adjudication process indeed have the beneficial "legitimacy" effects claimed: producing greater deference to the decision, whether one agrees with it or not? Second, what are the features of an adjudication process that are essential to it being perceived as fair, that will best promote its "legitimacy"?

As to the first question – does legitimacy produce the claimed beneficial deference effect? – Josh Bowers and I have pointed out elsewhere that the empirical evidence is not as clear as one might guess, given the popularity of the concept.[225] Most legitimacy research concerns itself with the second question – what will produce a perception of legitimacy? – rather than the first. Nonetheless, the claimed deference effect has some empirical as well as commonsense and anecdotal support.[226] A number of the absent-law situations add to that anecdotal evidence.

Recall that it was in part the arbitrariness of the discipline systems aboard naval ships of the day that helped prompt the rise of piracy.[227] In the mining camps of California, as noted previously, when a group felt that the Alcalde had been corrupted, they took the matter into their own hands.[228] Similarly, in San Francisco, the official criminal justice system lost its legitimacy after accumulating revelations about corruption and other improprieties in prosecution, or non-prosecution, of offenses.[229] Cornelisz, in the *Batavia* case, was originally lawfully elected head of the island committee, but when his arbitrariness led to a loss of legitimacy, his influence ended: When he sent a letter to the other island directing certain persons and equipment be turned over, his order was simply ignored.[230] These are all examples of a failure of legitimacy that translated into a lack of cooperation or deference.

The conclusion that one can reach on these accounts is that absent-law groups tend toward fairness in adjudication and enforcement not simply because people prefer fairness but because fairness has practical benefits that contribute to the success of the enterprise, which often was survival for an absent-law group. Many of the groups were in such difficult situations that one might expect them to see fairness as a luxury they could not afford. But it often prevailed despite the difficult circumstances because it had practical value.

The absent-law experience also can offer anecdotal evidence to help answer the second question – what features of an adjudication procedure are the most important to earning a reputation for being fair? Given the difficult circumstances, one may suppose that the fairness features that groups adopted were those that they saw as being most essential to fair adjudication. Commonly the groups were in no position to afford a luxury of fairness features were not seen essential. Thus, the adjudication features that were common in absent-law situations might be taken as what one might call the "core" of perceived fair adjudication.

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[224] Josh Bowers & Paul H. Robinson, Perceptions of Fairness & Justice: The Shared Aims & Occasional Conflicts of Legitimacy and Moral Credibility, Wake Forest Law Review [manuscript at 3] (forthcoming 2012) [hereinafter *Bowers & Robinson, Legitimacy & Moral Credibility*]

[225] Id. at [manuscript at 63].

[226] Id.

[227] Leeson, Invisible Hook supra note, at [103]

[228] Shinn, supra note [9], at 194.

[229] Williams, supra note [9], at 296.

[230] Dash, supra note [8], at 180.

What are the common features of adjudication in absent-law situations? While there was diversity among the groups in the specifics of their procedures, as one might expect given the diversity of their situations, one can identify some nearly universal features. First, wrongdoing generally was resolved in public for all to see, not behind closed doors.[231] This was true even on pirate ships, for example, where most of the crew were hardly use to much due process under the standard naval discipline system of the day from which they had come.[232] Any system that did not provide a public adjudication would have difficulty establishing a reputation for fairness, one might guess, because people could not really know what the adjudication procedures were.

A second common feature was an unbiased decisionmaker acting on the authority of the group. This was sometimes the entire group itself, but often a subgroup or just an appointed leader. Typically, the more serious the offense, the larger the decisionmaking group. The appointed leader might adjudicate minor offenses, a more serious offense might require a group, and the full group and even persons from other groups might be required for the most serious offenses. This was done, for example, among the gold miners, where miners from other camps might be brought in for a serious offense.[233] When a murder occurred on a wagon train, the entire wagon train might leave off travel to hear the case, even bringing in members from another train in the area.[234] (Note that this shift in group size parallels the American practice that requires a 12-member jury for felonies but permits a six-member jury for lesser offenses.[235])

Relatedly, when the decisionmaker was less than the full group, that person or subgroup was seen as acting for and on the authority of the group. The gold miners often elected a judge for a case.[236] Some pirate codes directed that the elected captain decide cases, or a majority of the company.[237] This group-representation requirement, like the shift in group size according to offense seriousness, seems consistent with an attempt to build legitimacy in the decisionmaking process. The more serious the offense, and therefore the more serious the penalty, the more important it was for the adjudication process to be one in which the group had faith its fairness.

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[231] During the Attica Prison uprising, one of the groups most emphatic demands was that all negotiations were to be done in full view of the group. Wicker, supra note [12], at 229-230. The Vigilante Committee of San Francisco, drafted specific rules of conduct, invited every member of the community to join, and held public trials for all persons brought before the committee. Williams, supra note [9], at 205. When a divisive element begins to grow within the survivors of the *Grafton* . The crew d9cussed the rules that they needed, agreed to them, wrote them in a book, and read them out once a week. Raynal, supra note [7], at 95-97.

[232] See Leeson, An-arrgh-chy, supra note [109], at 1057

[233] Shinn, supra note [9], at 194.

[234] See Scott, supra note [70].

[235] Robinson, Criminal Law, supra note [94], at 91.

[236] In the case of Sim vs Sprenger, the case had been heard. The group believed that it was a miscarriage of justice. Before they retired the case, they brought everyone into the camp and debated as to whether they could and should form a court of appeals. Once that had been agreed upon, the group elected a judge who would act as the head of the court of appeals in the current case, and in any future ones that arrived. No action took place until people from all over the district had time to arrive in the camp where the wrong occurred. Shinn, supra note [9], at 194.

[237] In some of the surviving pirate codes, the punishment is not stated. Rather the punishment is to be decided upon when the need arises: "shall suffer what Punishment the Captain and the Majority of the Company shall think fit." Pirates ships elected their captain and were free to depose him as they saw fit. http://www.vleonica.com/lowther.htm

These requirements also seem consistent with a purpose to highlight the wrongdoing as not just a private wrong but as a violation of the group's interests, which was to be punished by the group and under the group's authority.

When illegitimate authorities were attempting to legitimize their control over a group, it was common for them to stage public displays in an attempt to create an impression of legitimacy. On both the *Batavia* and the *Globe*, the mutineers took the trouble to write up codes, have themselves elected leaders, and hold public trials as they sought to eliminate their opposition. They apparently understood that rather than skipping the public jury trial, they were better off quietly perverting it, such as by stacking the jury.[238]

A third common feature of absent-law adjudications was giving the defendant an opportunity to be publically heard and to present his side of the story, or perhaps to confess wrongdoing and ask for leniency. Pirate ships, wagon trains, gold miners, the group trapped in the Andes, many ship wreck crews, and the Vigilance Committee of San Francisco, all held trials at which the accused was given a chance to publically present his side.[239]

Finally, a fourth common feature was the use of a supermajority requirement in the group's decisionmaking before punishment could be imposed. In the wagon trains, for example, if there was significant disagreement among the jurors, the punishment would not go forward.[240] Similarly, the pirate codes defining offenses and setting punishments typically required unanimity, while only a majority vote was required for electing officeholders.[241] This mirrors modern American practice of requiring unanimity or near unanimity for conviction in criminal cases.

One might speculate, then, that these features are essential to a perception of fairness and that any compromise on these features would be costly in undermining the system's legitimacy and the practical benefits that flow from it.

Compare these common features to other features of an adjudication process that one might think important to fairness.[242] A right to counsel, for example, commonly was not provided.[243] One might argue that the right to counsel may not have been so important in such cases because the laws and the adjudication process were not so complex and technical as today, but rather the product of the group's own intuitions about fairness and justice. On the other hand, counsel might have been useful in providing advice on what argument strategies a defendant might best follow or in providing a more elegant articulation of the defendant's arguments. Another adjudication feature not typically given was a right against self incrimination; the accused was expected, if not compelled, to speak up and provide an account of the relevant events. Similarly, pre-trial discovery of the prosecution's evidence was not a common feature.

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[238] Drake-Brockman, supra note [8], at 165; Comstock, supra note [11], at 88-93.

[239] See Leeson, An-arrgh-chy, supra note [109], at 1057; Scott, supra note [65]; Shinn, supra note [14], at 194; Read, supra note [5], at 221; Williams, supra note [9], at 107.

[240] One individual was tried twice for failure to perform his guard duties, but in both cases he was let off because the jury could not agree. F. G. Young, ed., Sources of the History of Oregon: Journal of Medoram Crawford 11 (1897).

[241] Leeson, Invisible Hook, supra note [103], at 76.

[242] For an elaborate account of public perception of fairness in criminal adjudication procedures see Tracey L. Meares, Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice, 3 Ohio State Journal Of Criminal Law 105 (2005).

[243] For an exception in the mining camps, see Shinn, supra note [9], at 170.

(But this might have been because, given the smaller size of the group, the defendant might normally already know what the group knew.) Nor was it common for a defendant to be granted delays in adjudication to better prepare his case.

The fairness features commonly used and those not commonly used follow an interesting pattern: those commonly used are the features that not only provide fairness but also are likely to produce more accurate and just results; those not commonly used are those that may provide fairness to the defendant but are not so obviously essential to getting an accurate and just result. If one imagines an adjudication system without the features common in absent-law situations – an adjudication that was not public or did not have an unbiased decisionmaker or in which the defendant lacked the opportunity to be heard or that allowed punishment without at least a strong majority – one can easily imagine a system that frequently gets it wrong, where the results are likely to be regularly unreliable in assessing deserved liability and punishment. In contrast, the fairness features not commonly used in absent-law adjudications might in one case or another advance accuracy and justness, but might not have that same devastating effect on accuracy as would the lack of the "core" of adjudication fairness.

This pattern might have implications for modern adjudication systems. If the features at the core of fairness are those essential to accurate results, one might speculate that the driving force is not an independent interest in fairness to defendants for its own sake as much as an interest in fair procedures as a means to reliable results. To some extent, this conception conflicts with modern legitimacy scholarship, which tends to see fairness in adjudication as a value independent of just results. Indeed, some appear to argue that it is more important than just results.[244]

The point becomes important because fair procedures and just results often conflict with one another. As Josh Bowers and I point out:

> Consider, for example, such stalwarts of the American criminal justice system as the prohibition against allowing prosecutors to rely on illegally seized evidence, or to retry acquitted defendants, or to delay trials as best suits effective prosecution. The rights against double jeopardy and to a speedy trial, as well as the exclusionary rule, all have been constitutionally enshrined to some extent. Yet it may well be that the virtues that drive these procedural rules are not accuracy in truth-finding or reliability in doing justice. On the contrary, each of these rules, and many others, can easily frustrate justice.
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> The exclusionary rule can exclude reliable evidence that allows the perpetrator of even a serious offense to go free, a result that cannot help but draw the criminal justice system into disrepute, at least with regard to its commitment for doing justice. In the case of Larry Eyler, for example, police suspected Eyler of a string of gruesome killings of young gay men. When a state trooper just happened upon Eyler parked on the side of the highway preparing for another kill of a young hitch-hiker, he became suspicious, called headquarters and heard of prior suspicions, and took Eyler to the station, probably saving the hitch-hiker's life. A search of Eyler's vehicle turned up conclusive proof of his previous crimes, but the court excluded the evidence because the search was unlawful. Eyler was released to kill again, and, indeed, did so before subsequently being captured and convicted for the later crime. Many may wonder whether this frustration of justice,

[244] See Tyler & Darley, Morality and Legitimacy, supra note [228], at 723.

together with its high cost in human life, is worth the benefits that the exclusionary rule offers.

The double jeopardy bar may present a similar situation. In the case of Melvin Ignatow, for example, Brenda Schaefer was brutally raped, tortured, and killed by Ignatow and his former girlfriend. At trial, the girlfriend testified for the prosecution but came off as an unreliable witness and Ignatow simply lied his way to reasonable doubt. He was acquitted. Ten months later, as the new owners of Ignatow's former house were putting down new carpeting, they found film taped inside a floor duct. When the film was developed, it provided a grisly record of Ignatow's horrendous offense, yet Ignatow could not be retried for the murder. Again, this gross failure of justice is likely to undermine in many peoples' minds the system's commitment to doing justice.

Or imagine that an Eyler or an Ignatow is released because of a speedy trial violation, or because a statute of limitations has run, or because the text of an offense statute was ambiguous (even though the defendant knew his conduct was wrong). The fairness interests may be clear – speedy trial rights, statutes of limitation, and the legality principle are common and well established – but the justice costs can be significant.[245]

When fairness and justice conflict, one must decide which of the two to advantage at the expense of the other. If the justification behind building a reputation for legitimacy in adjudication and moral credibility in giving just results is to gain the practical benefits of deference that flow from those reputations, then presumably one would want to give preference in a conflict to the one that had the greatest effect in producing those practical benefits. If the

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[245] Bowers & Robinson, Legitimacy & Moral Credibility, supra note [229], at [Part V.A.] (footnotes omitted). The passage continues:

> Nonetheless, there are good reasons to insist on adhering to the conventional standards and rules that are premised on fairness concerns. First, and obviously, fairness is an important value in itself. But there are practical crime-control reasons beyond this, as Parts II.A and III.A have shown. But one can say more. For example, the system's adherence to these fairness rules, even in such costly cases, advertises the extent of its commitment to them. Indeed, it is the costs of undermining justice in discrete cases that may do the most to advertise just how devoted the system is to these fairness interests. If the system is willing to follow such rules even when they undermine justice in such egregious cases, the message says, then citizens can have confidence that the rules certainly will be followed in the more common less egregious cases. That demonstration of high commitment enhances the system's legitimacy, with it's the consequent benefits of greater deference and compliance.
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> However, one can imagine ways in which a society might strike a different balance between fairness and justice on these, and other, issues. A system might limit application of the rules, perhaps by applying them less rigorously in case of serious offenses, as some have suggested. Or a system might shift to alternative procedures that could effectively advance fairness interests without jeopardizing justice – for example, by replacing the exclusionary rule with a robust civil-compensation or administrative-disciplinary regime that could punish police for unlawful searches of any individual (and not just for unlawful searches of accused offenders). Or a system might narrow application of rules and standards in circumstances where the threat of injustice is high, but the threat of unfairness is low. For example, the system might bar application of double jeopardy when a defendant's deceptive conduct helped generate the original acquittal.

absent-law experience is read to suggest that, at bottom, people perceive fair procedures as essential when and because they more reliably produce just results, it may suggest that when fairness procedures conflict with reliable justice, it is the fair procedures that ought to give way. That is, if one is trying to maximize both legitimacy and moral credibility in order to gain the benefits of deference, then the greatest deference may come from advantaging just results over fair procedures.

The point here is not to argue that interests of fairness ought not to be given weight. Many fairness interests seem not only important but quite essential, and not only because they advance a perception of legitimacy and thus promote deference to the rules and to authorities. They often are important, even essential, because they advance some other interest. The legality principle, for example, which prefers a prior, written, precise statement of what constitutes an offense no doubt is part of what people would perceive to be an important part of fairness. Legality frequently frustrates justice, however, by allowing an escape from deserved punishment of a person who has committed what the community, and even the offender, sees as wrongdoing, but where the statute has not been drafted in a way that is sufficiently clear in its coverage of the conduct at hand.[246] (Consider the crematorium operator who throws hundreds of bodies in his back yard to rot instead of cremating them, who is pleasantly surprised to learn that no criminal statute expressly and specifically criminalizes such conduct.[247]) Even though it frustrates deserved punishment, a society presumably would want a legality principle. Its operation may well regularly undermine the system's moral credibility and, thereby, its deference-inducing effect, but the independent virtues of the legality principle outweigh its costs to just punishment. Those societal interests go beyond crime-control, and may include things such as the deontological value of fair notice, the equality value of promoting uniformity in application, and the democratic value of reserving the criminalization decision to the more democratic legislative branch[248] In other words, even if the increase in legitimacy derived from following the legality

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[246] Robinson, Criminal Law, supra note [98], at § 2.4. One does not need the legality principle as a defense in cases where the defendant has made a reasonable mistake of law because the law has not been made recently available beforehand. Modern criminal law can provided a excuse defense here.

[247] See e.g. the Marsh case *in* Paul H. Robinson, Criminal Law: Case Studies & Controversies, sec. 2 (3rd ed., forthcoming 2012).

[248] Robinson, Criminal Law, supra note [98], at § 2.4.2.

A related matter arises from the difference in "codification" practice in the absent-law situations. When groups do reduce their rules to writings, they are almost exclusively focus on liability and punishment rules, such as what conduct is prohibited and what punishment will follow for a violation. Such writings rarely, if ever, concern themselves with adjudication procedure matters. One could look at this pattern and conclude that the liability and punishment rules were simply much more important to the group than the adjudication procedures, and this might be taken to support the proposition discussed above that just results are seen as more important than fairness in adjudication when the two conflict.

However, in this instance, it is not clear that the pattern of practice supports such a conclusion. The explanation for the pattern of practice may be that the liability and punishment rules serve and ex ante function, while the adjudication rules serve only an ex post function. [cite Nw and U Chi and others] That is, to be effective, conduct rules must be presented beforehand, and this would be intuitively obvious to the groups. People need to know what conduct they must avoid (and, to the extent that the threatened punishment is needed for deterrent effect, they need to the punishment that will follow from a violation). In contrast, there is not the same need for a group to decide and announce its adjudication

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principle were outweighed by the loss of moral credibility from the failures of justice it produced, that net loss of deference is not the only issue with which a criminal justice system must concern itself.

G. Crime-Control Policy on Organized Crime and Terrorism

Every liberal democracy has good reason to try to do justice and fight crime. Most obviously, it has an obligation to protect its citizens, who have given up rights to the state – including giving the state a near monopoly on the lawful use of force – in exchange for a promise of protection. As Part III.A explains, there is crime-control value in doing justice because it promotes the moral credibility of the criminal justice system, which can in turn promote deference to the law. Part of that dynamic is that a criminal justice system seen as doing justice is more likely to blunt the temptations of vigilantism.

But the absent-law case studies suggest that there are other less obvious reasons for a liberal democracy to be effective in fighting crime. If crime-control is weak, organized criminals can build strength, and with those greater powers and resources can corrupt and control government. American Prohibition offers an example. It was that period of lawlessness that gave birth to organized crime in the United States,[249] and allowed it to grow strong enough to be able to afford to buy local and state governments. It has taken most of the century since Prohibition to bring organize crime under control, if that is where it arguably is now.[250]

An even more compelling example is the experience of Colombia under Pablo Escobar. Once criminal elements were allowed to reach a critical point of power where they could afford to corrupt officials, it was difficult to dislodge them. What became required were methods that liberal democracies normally would find abhorrent. But once organized crime gets strong enough, there may be few, if any, acceptable means by which a democracy under the control of criminal elements can regain its footing. One option is for the state to give up some of its sovereignty to a "big brother" that will come in and use its strength to overpower the criminal elements. Not all democratic governments will be willing to compromise their sovereignty, for both ethical and nationalistic reasons. That approach also requires a "big brother" willing to undertake the risks and costs of such intervention. It was only by luck for Columbia that the United States saw Pablo Escobar's criminal enterprise as endangering United States interests, thus creating a willingness to intervene. This may not be the case with many if not most criminal enterprises that come to control governments.

The other method available to fight criminal elements who have become so strong as to take control of government is the adoption of the brutal methods of the criminals. The targeted killings of Pablo Escobar's lieutenants and associates by Los Pepes were highly effective, probably more effective than the U.S. help, but it is not something that most liberal democracies

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[248] (...continued)
practices before there is to be an adjudication. Given the difficulty of the circumstances, it might be efficient to delay the adjudication rules determination until after there has been a violation and the group is faced with the need for an adjudication.

[249] Annelise Graebner Anderson, The Business of Organized Crime: A Cosa Nostra Family 11 (1979); Mark Thornton, The Economics of Prohibition ch. 5 (1991).

[250] Anderson, id., at 10; Howard Abadinsky, Organized Crime, Sec. V (2009).

would be willing to bring themselves to do. Even when faced with an alternative of their own destruction, and the abuse and killing of its citizens, many liberal democracies might simply find such methods too inconsistent with their basic principles.

The conclusion here is that if the ultimate goal is to protect liberty, government must be vigilante to never allow organized criminals to gain a power sufficient to corrupt government, thereby requiring intervention that demands extreme measures. In other words, when making the calculations in balancing effective crime fighting against personal liberties, a democratic society must include in the calculation the need to avoid at all cost criminal groups reaching the "critical power point" at which they can control government, which may be a point of no return (without the use of unacceptable methods).

This twist in crime-control calculations may help explain the willingness of many to ignore some of the traditional principles of criminal law in the creation of the peculiar RICO offenses that were designed to fight organized crime families in the United States.[251] It is hard to determine the real harm being described when reading the extremely complex RICO offenses. The offensive conduct may be something as simple as "investing monies" when connected with certain background conditions. RICO have been criticized improperly broad in scope, lacking a coherent definition of the criminal conduct, and providing an expansive evidentiary scope that permits the introduction of character evidence and prior bad acts.[252] But traditional criminal law had proved itself ineffective at curbing the power of criminal groups. While the new RICO statutes seemed a bit odd by traditional standards, they were ultimately effective in stopping the rise of organized crime and in breaking its power to subvert government.

Government responses to terrorism may reflect a similar calculation.[253] Just as the terroristic methods of Pablo Escobar in Colombia proved quite effective in gaining power, many countries in the world have been destabilized by the effectiveness of suicide bombers and political assassinations. The governmental response to terrorism has been controversial with many civil libertarians,[254] but the lesson of Colombia and other similar absent-enforcement situations suggests that, while many of the anti-terror measures may be unattractive and ought to be scrutinized, in the end they may be the better path to a liberal democratic society than letting organized terror gain power over governments that cannot be countered except by an even greater intrusion on liberties.

On the other hand, the terrorism threat is somewhat different from the organized-crime threat. The former influences through intimidation alone, while the latter through corruption, with intimidation of officials as an add-on. One might argue that U.S. history suggests that,

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[251] 18 U.S.C. §§ 1961-1968

[252] Gerard E. Lynch, RICO: The Crime Of Being A Criminal, 87 Colum. L. Rev. 661, [Parts I-IV] (1987); Robinson, Criminal Law, supra note [98], at § 12.4.

[253] see, e.g., Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts (2007); Oren Gross, Security vs. Liberty: On Emotion and Cognition, *in* The Long Decade: How 9/11 Has Changed the Law (David Jenkins et al. eds., forthcoming 2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952344&http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDMQFjAB&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%3Fabstractid%3D1952344&ei=Q7j4TrT2H4ydOsnExbsB&usg=AFQjCNEi0nzQZl3ZntckNxJmQVq3pllcnw&sig2=vYmT8ZRUuBvbbbnWDpaexA

[254] Shamsul M. Haque, Government Responses To Terrorism: Critical Views of Their Impact on People and Public Administration, 62 Public Administration Review 170, 170 (2002).

while the threat of influence through corruption is real, it would be hard to imagine a U.S. government cowed by intimidation, as the Colombian government was by Pablo Escobar. If the U.S. government can be bought but not cowed, it suggests that arguments for curbing civil liberties to prevent criminals from reaching the "critical power point" at which they can control government, may be relevant to fighting organize crime but not to fighting terrorism. On the other hand, terrorists with a weapon of mass destruction might change the assumptions and provide a real basis by which even a U.S. government can be ruled by intimidation.

One other implication of this analysis is that the liberty-vs.-crime-control balance that one strikes necessarily depends on the context. The balance that the U.S. strikes may not be the best balance for another society if it stands in a different situation than the U.S. with regard to threats of corruption or intimidation. The lesson here is that U.S. reformers ought to be careful about what they export, and reformers in other countries ought to be careful about what they import from the U.S. Note, for example, that other countries have considered adopting the U.S. exclusionary rule and its entrapment defense,[255] both of which strike a balance between protecting liberties and fighting crime.[256] Yet the propriety of the balances reflected in those doctrines may depend upon the crime-threat context. While the U.S. might be able to afford such a balance, this might not necessarily be a good balance for another society facing different threats. Perhaps it is for this reason than many American non-exculpatory defenses, such as the exclusionary rule, have been rejected by other countries, including other liberal democracies.[257]

IV. SUMMARY AND CONCLUSION

Humans have been working in groups without government or law for more than a hundred thousand years and have not only survived but flourished. That success has been in large part a product of the natural tendency of humans toward social cooperation. The several dozen examples of absent-law situations discussed in Part I give a glimpse of what the operation of the original human groups on the Serengeti Plain might have been. Rather than the strong exploiting the weak, Part II demonstrates a tendency of humans toward social cooperation, even

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[255] See, e.g., Jacob Dolinger, The Influence American Constitutional Law on the Brazilian Legal System, 38 Am. J. Comp. L. 803, 827 (1990) (rejecting American exclusionary rule for fear it will lead for the release for dangerous criminal and have adverse effect on public safety); Binyamin Blum, Doctrines Without Borders: The "New" Israeli Exclusionary Rule and The Dangers of Legal Transplantation, 60 Stan. L. Rev. 2131, 2135-9 (2008) (Israeli Supreme Court ruled that most suitable rule for Israeli justice system is a discretionary exclusionary rule, which allows courts discretion to exclude evidence in appropriate cases and repaid injustices caused by police misconduct); Harry M. Cladwell & Carol A. Chase, The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call To Examine The Rule In Light of Changing Judicial Understanding About Its Effects Outside The Courtroom, 78 Marquette L. Rev. 45 (1994) (England, Canada, Australia and New Zealand adopted a discretionary exclusionary rule that does not mandate automatic exclusion).

[256] Paul H. Robinson & Michael Cahill, Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve ch. 7 (2005).

[257] Adam Liptak, U.S. Is Alone in Rejecting All Evidence if Police Err, New York Times (July 19, 2008), available at: www.nytimes.com/2008/07/19/us/19exclude.html?pagewanted=all (American non-discretionary exclusionary rule rejected by all other countries, including Canada, Australia, England, and European Court of Human Rights).

when it is not obvious to a person at the time that such is in his or her individual interest. Cooperation can be derailed, but it seems to have a surprising persistence.

However, cooperative action is possible, the absent-law situations illustrate, only when a group establishes norms against basic wrongdoing and a system of punishment to enforce them. But having a system of punishment in itself does not provide the needed foundation for social cooperation. It is justness in punishment – which takes account of a violator's moral blameworthiness as the group perceives it – that serves as the foundation for cooperative action. Regular injustices or failures of justice tend to produce alienation and discord, rather than cooperation. The desire for justice can be overborne by immediate circumstances, but seems to be the human default to which the group will revert when conditions permit.

The intuitions about wrongdoing and punishment that humans share may well have been necessary for our success in an earlier age, but times have changed. Perhaps we now have the means to create through government and law an organization of society that does not rely upon the group dynamics of justice and cooperation that seem so essential to success in the absent-law situations? Yet, the lessons from the absent-law situations, especially an appreciation for our inherent desire for justice and its role as a foundation for social cooperation, continue to have relevance in a modern legal world, as Part III spins out.

Whether they like it or not, those who shape our modern world must accept human nature as it exists. Civilization has done much and can do more to educate and socialize humans toward views that promote social good. But there are limits to what can be done to change human nature. There seems little doubt that human success will always demand a high degree of social cooperation, which in turn may require the just punishment of wrongdoing – not only because such encourages cooperation but because doing justice has come to be seen by humans as a value in itself without regard to its practical benefits.